

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

Issue Date: 16 November 2018

CASE NO.: 2018-LCA-00004

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*In the Matter of:*

**AMR BELTAGUI, M.D.,**  
*Prosecuting Party,*

v.

**NEBRASKA DEPARTMENT OF HEALTH  
AND HUMAN SERVICES,**  
*Respondent,*

*and*

**ADMINISTRATOR, WAGE & HOUR DIVISION,  
UNITED STATES DEPARTMENT OF LABOR,**  
*Party In Interest.*

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Before:

Colleen A. Geraghty, Administrative Law Judge

Appearances:

David A. Yudelson, Esq., Alyssa Stokes, Esq., and Ryan J. Sevcik, Esq., Koley Jessen PC, LLO,  
Omaha, Nebraska for the Prosecuting Party

Tara Paulson, Esq., and Mark A. Fahleson, Lincoln, Nebraska for the Respondent

**DECISION AND ORDER AFFIRMING IN PART AND MODIFYING IN PART  
THE ADMINISTRATOR'S DETERMINATION**

This case arises from a request for hearing filed by Amr Beltagui, M.D. ("Dr. Beltagui" or "Prosecuting Party"), involving the enforcement of an H-1B Labor Condition Application by the Administrator, Wage & Hour Division, United States Department of Labor ("Administrator" or "WHD") against Nebraska Department of Health and Human Services, the Respondent ("DHHS" or "Employer") under section 212(n) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(a)(15)(H)(I)(b) and § 1182(n), and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subparts H and I. 20 C.F.R. § 655.700 *et seq.*

## **I. PROCEDURAL BACKGROUND**

On August 19, 2016, Dr. Beltagui filed a complaint against DHHS with the U.S. Department of Labor, alleging violations of the H-1B provisions, including that the Employer failed to pay correct wages and offer either equal benefits or equal eligibility for benefits. Following an investigation, the Administrator issued a letter, dated November 7, 2017, informing the parties it found that DHHS failed to pay required wages in violation of 20 C.F.R. §§ 655.731 and 655.731(c)(3). Specifically, the Administrator determined the required wage rate increased in accordance with each COLA increase that was offered on July 1, of 2015, 2016 and 2017. JX-1 at 2-3. By requiring Dr. Beltagui to repay the COLA increases he received, and by reducing Dr. Beltagui's rate of pay to the amount prior to July 1, 2015, DHHS failed to pay the required wage rate. JX-1 at 2-3. The Administrator also found violations pertaining to the benefits DHHS offered to Dr. Beltagui. JX-1 at 3. Specifically, DHHS failed to offer and provide Dr. Beltagui with the same benefits as similarly provided to U.S. workers by excluding him from participating in the retirement and deferred compensation plans, and for failing to pay Dr. Beltagui the matching contributions it made to Dr. Beltagui's retirement plan account. JX-1 at 3-4. The Administrator ordered DHHS to pay back wages in the net amount of \$68,358.80, after the deduction of required taxes to Dr. Beltagui, and ordered DHHS to comply with 20 C.F.R. § 655.731 in the future. JX-1 at 4-5.

By letter dated November 21, 2017, Dr. Beltagui, timely filed a request for hearing to review the Administrator's determination. In his appeal, Dr. Beltagui disagreed with the Administrator's calculations for the amount it found DHHS owes Dr. Beltagui for its violations. The formal hearing was held on June 7, 2018, in Omaha, Nebraska.

At the hearing, the parties had a full opportunity to present evidence and argument. Testimony was heard from Dr. Beltagui, Vince Wilson, Kelly Tep, and Nikki Suez. Formal documents were admitted as Administrative Law Judge Exhibits ("ALJX") 1-6. TR 10. Documentary evidence was admitted as Joint Exhibits ("JX") 1-9, Prosecuting Party's Exhibits ("PX") 1-5, and Respondent's Exhibits ("RX") 1-17. TR 7-8, 52, 130-134.

Closing briefs were received from the Prosecuting Party ("PP Br.") and Respondent ("Resp. Br.") on August 28, 2018, and from the Administrator ("Admin. Br.") on August 31, 2018.<sup>1</sup> The record is now closed.

## **II. FINDINGS OF FACT**

### **A. Parties' Stipulations**

Before the hearing, the parties stipulated in writing to the following facts:

1. Dr. Beltagui was formerly employed under contract as a Psychiatrist at the Norfolk Regional Center, a psychiatric hospital operated by DHHS from August 1, 2014 to July 31, 2017;
2. Dr. Beltagui was employed as an H-1B employee under the Immigration and Nationality Act, Section 101(a)(15)(H). Dr. Beltagui was the only H-1B employee at the Norfolk Regional Center;

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<sup>1</sup> The Administrator also submitted its closing brief via e-mail on August 28, 2018.

3. Pursuant to Paragraph II.A of the Employment Contract between Respondent and Dr. Beltagui, effective August 1, 2014 (the "Employment Contract"), Dr. Beltagui was to be paid "compensation not to exceed \$300,000 (Three Hundred-Thousand Dollars) per year[;]"
4. On or around July 1 of years 2015, 2016 and 2017, DHHS notified employees of cost of living allowance ("COLA") increases that would be issued to certain employees;
5. As it relates to the 2015 COLA increase, a notice was sent to all DHHS' employees on June 11, 2015 regarding July 1, 2015 pay increases. For employees such as Dr. Beltagui (i.e., non-classified), employees were eligible to receive an increase as determined by the appropriate appointing authority. On or around July 13, 2015, Dr. Beltagui received notice that the Director provided a recommendation to the CEO for DHHS for Dr. Beltagui to receive a pay increase of 2.25%. This COLA increase was originally paid out to Dr. Beltagui;
6. As it relates to the 2016 COLA increase, a notice was sent to all DHHS' employees on July 1, 2016 regarding July 1, 2016 pay increases. For employees such as Dr. Beltagui (i.e., non-classified), again employees were eligible to receive an increase as determined by the appropriate appointing authority. The Director provided a recommendation for Dr. Beltagui to receive a pay increase of 2.4%. This COLA increase was originally paid out to Dr. Beltagui from July 1, 2016 until August 24, 2016;
7. On August 19, 2016, DHHS informed Dr. Beltagui its position was that he was not eligible for COLA increases because the Employment Contract stated Dr. Beltagui's annual salary was capped at \$300,000. DHHS' position was that the 2015 COLA increase of 2.25% and 2016 COLA increase of 2.4% that Dr. Beltagui received resulted in an overpayment of \$8,043.85. Dr. Beltagui was given the option of (i) deducting the \$8,043.85 from the \$20,000 retainer subsidy he received pursuant to the Employment Contract; (ii) deducting the \$8,043.85 from Dr. Beltagui's regular paycheck; or (iii) writing a check to the Nebraska Department of Administrative Services. Dr. Beltagui opted to pay back, through payroll deductions, the \$8,043.85. This total amount was withheld from Dr. Beltagui's supplemental pay gross wages on two paychecks: (a) one dated December 29, 2016, in the amount of \$2,894.54, and (b) another dated December 30, 2016, in the amount of \$5,194.29;
8. As it relates to the 2017 COLA increase, a notice was sent to all DHHS' employees on June 5, 2017 regarding July 1, 2017 pay increases. For employees such as Dr. Beltagui (i.e., non-classified), again employees were eligible to receive an increase as determined by the appropriate appointing authority. Dr. Beltagui did not receive notice that the Director had provided a recommendation to the CEO for DHHS for Dr. Beltagui to receive a pay increase. Dr. Beltagui did not receive a COLA increase for 2017;
9. On December 30, 2016, Dr. Beltagui was also paid out vacation, sick pay, and holiday pay at a wage rate that did not account for any COLA increases;
10. Also, upon separation from employment, on or about August 17, 2017, Dr. Beltagui was also paid out vacation, sick pay, and holiday pay at a wage rate that did not account for any COLA increases;
11. When Dr. Beltagui began his employment with DHHS, he enrolled in two of the benefit plans available from the State;

12. The first plan was the Nebraska State Employees Retirement Plan (the “Retirement Plan”). The second plan was the Nebraska Deferred Compensation Plan (the “Deferred Comp. Plan”);
13. DHHS’ matching contribution under the Retirement Plan was 156% of Dr. Beltagui’s contributions. Retirement contributions for Dr. Beltagui began as of the pay period ending August 20, 2014. There was no “matching contribution” required under the Deferred Comp. Plan;
14. In September, 2016, Dr. Beltagui’s contributions to his retirement and deferred compensation accounts ceased being deducted from his paycheck and DHHS stopped the matching contributions to his retirement account;
15. On December 16, 2016, Dr. Beltagui received a letter from Orron Hill, Legal Counsel for Nebraska Public Employees Retirement Systems, explaining that it was DHHS’ position that Dr. Beltagui was ineligible to participate in either the State’s Retirement Plan or the Deferred Comp. Plan;
16. In December, 2016, DHHS refunded to Dr. Beltagui all of Dr. Beltagui’s contributions to his retirement and deferred compensation accounts. The parties have differing positions as to the amount refunded to Dr. Beltagui from his retirement plan account. DHHS’ position is that the amount refunded to Dr. Beltagui from his retirement account totaled \$27,835.12. Dr. Beltagui’s position is that the amount refunded to Dr. Beltagui from his retirement account totaled \$28,059.31. Both parties agree the amount refunded to Dr. Beltagui from his deferred compensation account totaled \$20,416.48. The returns on Dr. Beltagui’s contributions were also paid out to him by Ameritas Life Insurance Corporation, the plan custodian. Dr. Beltagui was not paid the amounts DHHS had originally contributed to Dr. Beltagui’s retirement and deferred compensation accounts<sup>2</sup> as matching contributions;
17. Dr. Beltagui filed a complaint with the U.S. Department of Labor, Wage and Hour Division (“WHD”) on August 19, 2016, and WHD determined that a “reasonable cause to initiate” an H-1B investigation was present. The full investigation period took place between August 19, 2015 until August 18, 2017;
18. The WHD determined that the DHHS failed to pay Dr. Beltagui the required wages in violation of 20 C.F.R. § 655.731 and failed to either offer Dr. Beltagui equal benefits or equal eligibility for benefits in violation of 29 C.F.R. § 655.731(c)(3);
19. The WHD computed amounts owed to Dr. Beltagui at \$68,358.80, and stated that this amount consisted of \$22,372.01 for failure to pay the required wage rate, and \$45,986.79 for failure to offer benefits or equal eligibility for benefits;
20. On November 7, 2017, Dr. Beltagui was notified by Determination Letter from WHD of its determination and his right to appeal the determination as an interested party;
21. On November 21, 2017, Dr. Beltagui submitted a letter to the U.S. Department of Labor, Chief Administrative Law Judge, requesting a hearing on WHD’s determination;
22. On January 5, 2018, the U.S. Department of Labor, Office of Administrative Law Judges (“OALJ”), Boston, Massachusetts, notified the parties that Dr. Beltagui’s request for a hearing was assigned to Administrative Law Judge Colleen A. Geraghty for hearing; and

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<sup>2</sup> DHHS did not make any matching contributions to the deferred compensation account.

23. On January 17, 2017, DHHS filed a Motion to Intervene in this matter, and such Motion was granted.

JX-9 at 5-8. I find these stipulations to be supported by the record and adopt them herein as findings.

## **B. Witness Testimony**

### *1. Dr. Beltagui*

Dr. Beltagui was hired by DHHS to render clinical medical services as a staff psychiatrist at the Norfolk Regional Center, where he was the only H-1B nonimmigrant employee. TR 39; JX-2 at 12, 176, 178. While working at the Norfolk Regional Center, Dr. Beltagui primarily took care of the sex offender psychiatric patients by admitting the patients, caring for them while they were there, and discharging the patients. TR 16. He explained that this “meant that [he] had to deal with a lot of violence there and a high level of acuity, in that restraints and seclusion were often used” and “[t]here was a safety and security center where [he] would seclude patients and so forth.” TR 16. Dr. Beltagui also had administrative responsibilities as well, “in terms of attending medical staff meetings and the like.” TR 16.

Dr. Beltagui testified he enrolled in two different retirement benefits plans. TR 17-18. As a Nebraska State employee, he was required to participate in the Retirement Plan and it was mandatory that he contributed a fixed percentage of his salary to the account, which was matched by the State of Nebraska at a rate of 156%. TR 17-18. Dr. Beltagui also testified that the other retirement benefits plan he enrolled in was the Deferred Comp. Plan, which was a voluntary plan that provided him with tax benefits, although the State did not match the contributions he made. TR 18. He testified that “given my income it just always made sense to maximize my contribution to that plan, to decrease my tax liability.” TR 19. Dr. Beltagui explained his contributions to the Deferred Comp. Plan were not even throughout the year, because he “would usually get to the maximum within either the first half or the second half of the year and not contribute for the other half.” TR 19.

Dr. Beltagui testified that he filed a complaint against DHHS with DOL “because I was, essentially, seeking to get what I was promised when I signed up, of getting equal, the same or similar benefits, as an H-1B employee, as my U.S. counterparts, which I believe – well, initially was the case and two years down the line was no longer.” TR 21. He explained he understood and agreed with the Administrator’s determination that DHHS was in violation of the H-1B program regulations, but he felt the award “was very short of what I would have been owed, and did not take all factors or aspects of the matter into consideration.” TR 22. Although Dr. Beltagui is not an accountant and does not have any specialized tax training, he testified that the calculations provided in the report provided by Vince Wilson, CPA, are “the closest I could get, or one could get, to offering me similar benefits to what was offered to my U.S. counterparts during those three years.” TR 22-23.

### *2. Vincent Wilson, CPA*

On behalf of Dr. Beltagui, Vincent Wilson (“Mr. Wilson”) a licensed certified public accountant (“CPA”) since 1996, prepared a report and testified at the hearing. TR 42-43. As part of his CPA practice, he prepares tax returns for businesses and individuals, and he estimates he prepared about 450 in 2017. TR 44. Mr. Wilson testified he works with approximately six physicians who participate in the benefit plans offered by the State of Nebraska, and he is familiar with the employee benefit plans of Nebraska State employees. TR 44-45.

Mr. Wilson was asked to calculate the additional compensation, including benefits, Dr. Beltagui would have received as compared to what he was actually paid by DHHS, had he been awarded COLA's in 2015, 2016, and 2017, and had he been permitted to participate in the 401(a) Retirement Plan and the Deferred Compensation Plan provided to other employees.<sup>3</sup> TR 48. Mr. Wilson prepared a report titled Revised Report, dated May 24, 2018 with his findings.<sup>4</sup> PX-2 at 1-8.

In preparing his report, Mr. Wilson was given a number of documents, including Dr. Beltagui's pay stub records, the DHHS investigatory report, prepared by the Department of Labor's Wage and Hour Division, three years of Beltagui's income tax returns. TR 49. Mr. Wilson explained he reviewed the tax returns "because a big part of the calculation is he was going to lose the deferral benefit of not being able to put funds, either himself or the matching funds from the DHHS, into his retirement account." TR 49-50. His report includes a summary section on pages 1-4, a chart totaling all funds he asserts Dr. Beltagui is owed on page 5, and then a detailed breakout by pay period on pages 6-8, which correspond with the summary portions of his report. PX-2.

The starting point for all of Mr. Wilson's calculations was the actual wages paid, as summarized on the Administrator's documents, so he could "breakout the amount on an hourly basis." TR 54-55, 66; PX-2 at 1. This was beneficial in determining the COLA increases, which was based on the hourly rate, and that would be the amount tied to his individual pay stubs. TR 55. Mr. Wilson noted the Administrator began its calculations as of July 2015, Dr. Beltagui's first anniversary and entitlement to a COLA increase. TR 57.

In his report, Mr. Wilson provided a summary chart referred to as "Table 1" to show what Dr. Beltagui's hourly base wage rate would have been had he received the COLA increases in 2015, 2016, and 2017. TR 59; PX-2 at 1. He found Dr. Beltagui had an hourly wage rate of \$144.23, which was based on Dr. Beltagui's annual salary of \$300,000, divided by 2,080 work hours for the year. TR 59-60; PX-2 at 1. Mr. Wilson then looked to the three "DHHS Notices of COLA" issued to DHHS employees that contained information concerning the expected COLA increases. TR 60-62; PX-2 at 1; *see also* JX-2 at 32, 35, 39. Based on the first notice informing employees including Dr. Beltagui, of a 2.25% COLA increase to begin on July 1, 2015, he applied this percentage increase and found Dr. Beltagui's wage rate would have increased to \$147.475 per hour. TR 62-63; PX-2 at 1; JX-2 at 32.

Using the same method, Mr. Wilson found Dr. Beltagui's wage rate increased to \$151.014 per hour, beginning July 1, 2016, and increased again to \$152.524 per hour, beginning July 1, 2017, consistent with COLA percentages awarded in each of those years. *See* TR 63; PX-

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<sup>3</sup> Mr. Wilson agreed with the Wage and Hour investigatory report's calculation as to the amount of the COLA raises Dr. Beltagui should have been paid. However he disagreed with the DOL calculation as to the "benefit plan contribution" because it "was based on the original contract amount, without the COLA raises." TR 56. Mr. Wilson also stated the DOL report "did not include the funds that were paid back out" to Dr. Beltagui from the Retirement Plan account, and they did not consider the deferred compensation amount. TR 57. He said the funds returned to Dr. Beltagui for his benefit plan contributions would not be included in what is owed to him now, but he explained "there would be either tax loss, because [he] would have had to pay tax on them, or there would be earnings that they're not in the fund earning anymore." TR 58.

<sup>4</sup> Mr. Wilson had previously prepared an initial report dated February 28, 2018. PX-1 at 1; TR 51. He explained his Revised Report was the same as his initial report except that the Revised Report included a change in earnings from the date of the first report to the date of the Revised Report. TR 51-52. At hearing and in this decision, I am referencing the May 24, Revised Report.

2 at 1; JX-2 at 35, 39. The purpose of calculating the COLA rates at a revised number that included each respective percentage increase was because “that would be the base amount for utilizing not just his wage payment, but also for his deferral amount and the match amount that – the required amounts – throughout his employment.” TR 63.

As noted, attached to Mr. Wilson’s report was a three page summary calculation spreadsheet, found on pages 6-8, which was referred to at the hearing as “Exhibit 2” to the report, and it contained several representative Columns. TR 63-64; *see* PX-2 at 2, 6-8. For example, in reference to the COLA issue, Mr. Wilson explained that Column A provides each of the pay period ending dates throughout Dr. Beltagui’s employment, and Column D shows the hourly rate Dr. Beltagui was paid at for the duration of his employment with DHHS, while Column E shows the required COLA wage rate. TR 63-64; PX-2 at 2, 3, 6-8. Column F represents the amount Dr. Beltagui’s hourly wage rate was short, and Column G is the “total dollar amounts that was shorted, based on the revised COLA amount” for each pay period. TR 64; PX-2 at 2, 6-8. Mr. Wilson found Dr. Beltagui is owed \$23,421.83 in additional wages as a result of DHHS denying him COLA increases in 2015, 2016, and 2017. PX-2 at 5 and 6-8 (Column G).

Next, Mr. Wilson addressed the 401(a) Retirement Plan DHHS initially permitted Dr. Beltagui to participate in before DHHS determined in mid-2016 that he was not eligible. He noted employees such as Dr. Beltagui were required to contribute 4.8 % of their gross wages and DHHS would match 156% of each contribution. TR 67. Mr. Wilson testified Dr. Beltagui was contributing 4.8 % of his salary during the period he was permitted to participate in the Retirement Plan. TR 67; PX-2 at 2, 6-8. Mr. Wilson referenced two checks paid to Dr. Beltagui when DHHS decided he could not participate in the retirement plan, represented “refunds of the amount that were in his Retirement Plan” which DHHS refunded to Dr. Beltagui. TR 67; PX-2 at 2. Mr. Wilson explained from those two refund checks, “Dr. Beltagui received the funds that were in his Retirement Plan, but they didn’t pay him the full amount of those funds, because they withheld the COLA increase that was paid to him as wages . . . out of those retirement funds when they paid them out to him.” TR 67-68; PX-2 at 2-3. He stated the repayment of funds from Dr. Beltagui’s retirement account created a tax event for Dr. Beltagui, meaning he paid income tax on the refunded amount. TR 68.

As for the required employer match to the Retirement Plan, Mr. Wilson explained because DHHS did not pay Dr. Beltagui the COLA amounts in 2015-2017, the matching contribution amounts were incorrect and “[t]he resulting under matching contribution amount to the complainant’s retirement plan calculates to \$63,375.22 during his employment.” PX-2 at 3. He testified that this amount represents the 156% employer matching contributions DHHS was required to make. TR 68-69. Mr. Wilson explained how he arrived at this figure at the hearing:

I took, per pay period, the amount of wages that the Doctor had from the original contract, and then through each subsequent year at the higher COLA rate, times his 4.8 percent that would go into his retirement account. And that is shown in Column H of Exhibit 2. And then from that, I multiplied it by the 156 percent required match, per pay period, in Column I, and continued that through the end of his employment.

TR at 69; *see* PX-2 at 3, 6-8.

Mr. Wilson was aware that the Retirement Plan had a guaranteed rate of return of no less than 5%. TR 71, 74; PX-2 at 3. However, he did not use 5% as the rate of return in his

calculations to determine the return (earnings) on the Retirement Plan contributions. TR 71-72; PX-2 at 3, 6-8. Mr. Wilson explained that he instead used the S&P 500 annual total return rates for specific pay period dates in determining the returns on both the Retirement Plan and the Deferred Comp. Plan.<sup>5</sup> TR 72-74, 78. However, he acknowledged that Dr. Beltagui would not have been able to use the S&P 500 rates of return for his Retirement Plan. TR 74-75.

Using the S&P rates of return, Mr. Wilson found the “required 156% employer match of \$63,375.22 would have experienced gains” and the balance “would have returns of \$13,565.97 through August 6, 2017.” PX-2 at 4. He testified that he applied a rate of return, listed in Column M of his spreadsheet, to each individual amount in the plan. TR 80; PX-2 at 4, 6-8. Mr. Wilson explained that the total balance of DHHS’ matching contributions plus the earnings would be \$76,941.19. TR 80. Thus, he found Dr. Beltagui lost out on a total of \$13,565.97 in earnings on DHHS’ matching contributions. PX-2 at 4. He obtained this figure by subtracting the amount of contributions DHHS would have made (\$63,375.22) from the total balance of DHHS’ contributions and earnings (\$76,941.19). TR 80; PX-2 at 4, 6-8.

Mr. Wilson then focused on the income tax consequences that resulted from not having placed these pre-taxed amounts into a Retirement Plan. TR 81; *see* PX-2 at 4. He explained any additional funds Dr. Beltagui, as a married individual, earned would be taxed at his top marginal rate because those amounts were added onto his current income. TR 81. Mr. Wilson stated that currently, and during the years in question, Dr. Beltagui was in the 33% federal tax bracket, and the 7.88% Nebraska tax bracket. TR 81; PX-2 at 4. Accordingly, Mr. Wilson used a 40.88% tax rate to calculate the tax loss and any additional funds Dr. Beltagui may be entitled to receive. TR 81; PX-2 at 4.

Applying this formula, he determined that if DHHS’ matching contributions were paid to Dr. Beltagui outside the Retirement Plan, rather than being a contribution to the plan Dr. Beltagui’s lost tax benefit would be \$25,907.79. TR 82; PX-2 at 4, 8. Additionally, Mr. Wilson, using the same tax rates, found that if the gains from the earnings on the matching contributions were also paid to Dr. Beltagui, then he would realize an additional tax loss benefit of \$5,545.77. TR 81-82; PX-2 at 4, 6-8.

The third full paragraph on page 4 of the report references the lost tax benefits Dr. Beltagui experienced because he was not able to deduct from income his contributions to the Retirement Plan, which is provided in Column P in the spreadsheet. TR 82; PX-2 at 4, 7-8. According to Mr. Wilson, from the day Dr. Beltagui was paid out his contributions to the Retirement Plan, through the end of his employment, there was a total of \$14,444.11 in income he was taxed on because he was not permitted to contribute to the Retirement Plan. TR 82; PX-2 at 4. Additionally, when Dr. Beltagui was refunded the amounts he contributed to the Retirement Plan in 2016, Mr. Wilson found the amounts were “not able to grow tax deferred” and he “lost some tax deferral on the growth of those funds” in the amount of \$1,692.37. TR 82-83; PX-2 at 4, 8. In total, Mr. Wilson determined Dr. Beltagui had a “total lost tax advantage on employee deferrals to the Retirement Plan of \$16,136.48.” TR 83; PX-2 at 4. As a result, Dr. Beltagui’s lost tax advantage of the Retirement Plan gains being paid out to him outside of the Retirement Plan amounts to \$2,032.40. TR 83; PX-2 at 4, 8.

With regard to the Deferred Comp. Plan, which Dr. Beltagui participated in for some periods of his employment, Mr. Wilson determined Dr. Beltagui experienced lost tax advantages because he was not able to maximize his contributions to the Deferred Comp. Plan during his

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<sup>5</sup> He acknowledged those rates differed by year. TR 77-80; PX-2 at 3, 6-8 (Columns K and M).

employment with DHHS, and he lost out on the earnings from his contributions. TR 83-84; PX-2 at 4.<sup>6</sup> According to Mr. Wilson, the actual lost tax advantage of not being able to contribute to the Deferred Comp. Plan and the gains on those taxes, amounted to \$12,853.16. TR 83-84; PX-2 at 4. In calculating this amount, Mr. Wilson explained:

I had the amount of the contributions compared to the deferral maximum that he would be able to make, the difference as a deficiency is what I calculated the lost tax effect on. So, it's not the entire amount of the contribution, it was just the difference between what the maximum was and what he did do during the period, and then took that times the same 40.88 percent.

TR 84.

In evaluating the lost tax benefits associated with the Deferred Comp. Plan, Mr. Wilson assumed Dr. Beltagui would contribute the maximum permissible: \$17,500 in 2014 and \$18,000 per year from 2015-2017. TR 84-85; PX-2 at 8. So the deficiency, or the difference between what the doctor actually contributed and the maximum he could have contributed, is the figure Mr. Wilson used in calculating the lost tax advantage. TR 83-86; PX-2 at 8 (bottom left). For example, Mr. Wilson explained that in 2014, the amounts Dr. Beltagui actually contributed to the Deferred Comp. Plan totaled \$2,769.20, but the total he could have contributed was \$17,500. TR 84-85; *see* PX-2 at 8. Thus, under the assumption that Dr. Beltagui was going to try to maximize his contributions to the Deferred Comp. Plan in 2014, he would have a lost tax advantage of \$6,021.95, based on the 40.88% tax bracket. TR 85; PX-2 at 8. Mr. Wilson acknowledged that Dr. Beltagui did not actually contribute the maximum amount in 2014. TR 84-85. He used the same formula for calculating the lost tax advantage each year in 2015-2017. TR 83-87; PX 2 at 8. Totaling the amounts for the years 2014-2017, he concluded Dr. Beltagui had a total lost tax advantage on the Deferred Comp. Plan of \$12,853.16. TR 83-84; PX-2 at 4. In addition, Mr. Wilson determined this lost tax advantage of \$12,853.16 “would have lost gains calculated on it totaling \$905.74.” PX-2 at 4 and 8 (Column I).

Finally, after accounting for all of the amounts owed to Dr. Beltagui, Mr. Wilson concluded \$184,599.52 was due. PX-2 at 5.

### 3. *Kelly Tep*

Kelly Tep (“Ms. Tep”) testified at the hearing on behalf of DHHS. TR 107-108. Ms. Tep started working as the payroll manager for DHHS, as well as eleven other agencies, in June of 2017. TR 108-109. As the payroll manager, Ms. Tep is responsible for reconciling and certifying correct wages on payroll for each pay period and quarterly reporting. TR 109. Ms. Tep, testified that in order for any “non-classified employee” to be eligible to receive a COLA increase, “they have to have a letter of discretion written by the director authorizing” such a COLA increase. TR 110-111. It is her understanding that the current method of awarding COLA increases to non-classified employees is the same as it was before she worked as the payroll manager for DHHS. TR 111.

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<sup>6</sup> Mr. Wilson noted Dr. Beltagui could have put his Deferred Comp. Plan portion of his contributions in the S&P, he explained that he did not know where Dr. Beltagui placed his actual Deferred Comp. Plan contributions because he “did not have the actual fund mix of where they were contributed.” TR 74-75. Again, Mr. Wilson used the S&P 500 rate of return to calculate the earnings Dr. Beltagui would have earned had he been permitted to participate in the Deferred Comp. Plan. TR 74-75; PX-2 at 4, 6-8.

After listening to Dr. Beltagui's testimony at the hearing, Ms. Tep testified that, based upon her review of the payroll records in this case, Dr. Beltagui was refunded the portion of the contributions made to his Retirement Plan account by DHHS. TR 111-112. According to Ms. Tep, an employee becomes vested in the Retirement Plan "the pay period after they have reached their three years of service date within the State of Nebraska," but she did not know whether Dr. Beltagui ever became vested in the Retirement Plan. TR 112. Ms. Tep believed Dr. Beltagui should have never been refunded DHHS' matching contributions if he was not vested, and he may actually owe the State of Nebraska money. TR 112-113.

Ms. Tep was also present for Mr. Wilson's testimony at the hearing, and counsel for DHHS directed her attention to PX-2, Mr. Wilson's report. TR 113. Based upon the information from the payroll system for the State of Nebraska and her familiarity with the compensation paid to Dr. Beltagui, Ms. Tep opined Mr. Wilson's report (PX-2) does not accurately reflect the amounts Dr. Beltagui was refunded by DHHS. TR 114-115. Although Ms. Tep did not dispute the accuracy of the dates Mr. Wilson identified as the dates when Dr. Beltagui received refunds from DHHS, she claimed Mr. Wilson incorrectly noted the net amounts paid to Dr. Beltagui on 12/23/16 and 12/29/16, and the gross amounts paid to Dr. Beltagui on 12/23/16, 12/23/16, and 12/30/16. TR 114-115.

On cross-examination, Ms. Tep was directed to paragraph 16 in JX-9, the parties' Joint Prehearing Statement, which states "Dr. Beltagui was not paid the amounts DHHS had originally contributed to Dr. Beltagui's Retirement and Deferred Compensation Accounts as matching contributions." TR 116-118. Nevertheless, Ms. Tep reaffirmed her earlier testimony that Dr. Beltagui was refunded some portion of the matching contributions made by DHHS. TR 118. On redirect-examination, Ms. Tep explained her calculations as to what Dr. Beltagui was refunded was based on the information in the payroll records provided to her that are maintained by the State of Nebraska. TR 120-121. When asked to explain what the correct amounts refunded to Dr. Beltagui from the Retirement Plan were, Ms Tep testified:

According to the 12/23/2016, December 23, 2016, check date that I was provided, the State refunded the Doctor \$7,991.92. We also refunded the Employee Retirement of \$5,123.03, and his Deferred Compensation Account of \$5,833.28. And then on a separate paycheck, dated December 29th, 2016, the State refunded the Doctor \$19,843.20. The employee portion of Retirement was \$12,720.00, his Deferred Compensation Account that was paid out to him was \$14,583.20.

TR 121.

#### 4. *Nikki Suesz*

Nikki Suesz ("Ms. Suesz") also testified on behalf of DHHS. TR 122. Ms. Suesz works as the regulation and contract manager for DHHS. TR 122-123. In this role, Ms. Suesz oversees between 100 and 150 contracts, and she is familiar with the process of extending written contracts to doctors working for DHHS. TR 123. She testified DHHS employs some doctors as employees and some doctors as independent contractors. TR 123-124. Counsel for DHHS directed the attention of Ms. Suesz to the contracts between DHHS and Drs. Stephen Paden, Sanat Roy, Bradley Rogers, and James Sorrell, all of which she claimed to be familiar with. TR 124-125, 130, 132-133. Ms. Suesz testified these doctors have substantially the same duties and responsibilities at DHHS as Dr. Beltagui had. TR 134.

On cross-examination, Ms. Suesz stated she began working as the regulation and contract manager for DHHS in August of 2017. TR 134-135. She first saw Dr. Beltagui's contract in the

fall of 2017, which is after Dr. Beltagui completed his employment with DHHS. TR 135. According to Ms. Suesz, there are three Regional Centers in the State of Nebraska for behavioral health. TR 135-136. She explained the Hastings Regional Center is “a home for youth” with patients who are “there on sex offender offenses.” TR 136. She further testified the work done at the Hastings Regional Center is not the same as the work done at the Norfolk Regional Center, because the Norfolk Regional Center is only for adults who were in prison before. TR 136.

Ms. Suesz also testified she was a psychiatric tech at the Lincoln Regional Center, where they would treat sex offenders. TR 137. Ms. Suesz was unable to definitively state whether any of the other doctors were either full-time or part-time workers, or whether there are any other physicians working for the State on an H-1B visa. TR 138-139.

### **C. Additional Findings of Fact**

#### *1. The Norfolk Regional Center*

The Norfolk Regional Center is “a state facility operated by DHHS to provide inpatient mental health services under the Nebraska Sex Offender Treatment Program.” JX-2 at 12. It is one of three Regional Centers operated by DHHS, with the other two being located in Lincoln and Hastings, Nebraska. TR 14-15. The Norfolk Regional center employs 202 permanent staff members. JX-2 at 131. According to Dr. Beltagui, the patient population at the Norfolk Regional Center is composed of only sex offenders, and it differs from that seen in the other Regional Centers. TR 15. He explained that if a person is deemed “still dangerous to send out to the street” after finishing their prison sentence, they are then referred to the Norfolk Regional Center. TR 15-16.

On the LCA, William Gibson, the CEO for DHHS, provided a written explanation of types of work done at the Norfolk Regional Center. JX-2 at 74-75. According to Mr. Gibson:

The Norfolk Regional Center (NRC) is a 120-bed Sex Offender Treatment Center providing Phase I services in the Nebraska Sex Offender Treatment Program. The Nebraska Sex Offender Treatment Program is a three phase treatment program meant to reduce dangerousness and risk of re-offense for patients involved in treatment. Phase I treatment orients patients to the treatment process; begins working with patients to accept full responsibility for their sex offending and sexually deviant behaviors; teaches patients to give and receive feedback and utilize coping skills; and builds motivation for the intensive treatment in Phases II and III which are provided at the Lincoln Regional Center.

JX-2 at 74.

#### *2. Retirement Benefit Plans*

There are two retirement benefit plans involved in this case: the Retirement Plan and the Deferred Comp. Plan. The Retirement Plan is a 401(a) cash balance retirement plan, and participation is mandatory for all permanent, full time employees. JX-7 at 7-8. Members who participate in the cash balance Retirement Plan do not make investment choices for their own or their employer’s contributions. JX-7 at 11.

Members of the Retirement Plan are guaranteed a rate of return on their accounts based on the federal mid-term rate, plus 1.5%, and if the federal mid-term rate falls below 3.5%, members receive a 5% minimum credit rate. JX-7 at 11. It is a requirement that members of the Retirement Plan contribute 4.8% of their compensation each pay period, and the employer (the

State of Nebraska) matches the members' contributions at a rate of 156%. JX-7 at 10. In order to be eligible to receive the employer's matching contributions upon termination or retirement, the member must be "vested." JX-7 at 10. "Vesting occurs after three years of plan participation, including vesting credit." JX-7 at 11. "When a non-vested plan member ceases employment, his/her employer contributions are forfeited." JX-7 at 11.

The Deferred Comp. Plan is a voluntary investment plan, authorized by IRS Code § 457 whereby members authorize their employer to defer part of their current compensation and receive the amount, plus earnings, at a later date. JX-8 at 4. Any State of Nebraska employee who is either a U.S. citizen or a qualified alien may participate in the Deferred Comp. Plan. JX-8 at 7. Participation in the Deferred Comp. Plan begins the calendar month after the employee submits a completed enrollment form. JX-8 at 7. After enrollment, plan participants are allowed at any time to change, stop, or re-start their contributions by completing a "DCP Plan Change" form. JX-8 at 7-8. Plan participants are required to contribute at least \$25 per month, but the maximum contribution amount allowed is the lesser of 100% of their annual compensation less mandatory retirement contributions, or the dollar limit established under the Internal Revenue Code. JX-8 at 8.

### **III. CREDIBILITY DETERMINATIONS**

In weighing the testimony of witnesses, the ALJ, as a fact finder, may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). Additionally, the ARB has stated ALJs may "delineate the specific credibility determinations for each witness," although such delineation is not required. *See Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009).

I find there is ample reason to afford no weight to the testimony provided by Ms. Tep and Ms. Suesz. Both Ms. Tep and Ms. Suesz testified on behalf of DHHS, which is where they both currently are employed. TR 108-109, 122-123. Although Ms. Tep works as the payroll manager for DHHS, and also for eleven other agencies, she did not assume this role until June of 2017. TR 108-109. Ms. Tep also based her testimony on her understanding that the current practice of awarding COLA increases is the same as it was before she worked as the payroll manager for DHHS. TR 111. Additionally, Ms. Tep testified that Dr. Beltagui was refunded the matching contributions DHHS made to his Retirement Plan, which directly contradicts the parties' joint stipulation that he did not receive that amount. TR 111-112, 116-118; JX-9 at 7-8. Thus, the value of Ms. Tep's testimony is significantly reduced by her conflicting testimony and her lack of first-hand knowledge about the facts of this case.

Similarly, Ms. Suesz was did not work in her current role as the regulation and contract manager for DHHS until August of 2017, which is after Dr. Beltagui's employment with DHHS terminated. TR 134-135. She also testified that she did not see Dr. Beltagui's contract until the fall of 2017. TR 135. Additionally, Ms. Suesz was unable to provide definitive answers to many questions about the employment status of the doctors working for DHHS. *See* TR 137-138. Like Ms. Tep, the value of Ms. Suesz's testimony is significantly reduced by her lack of first-hand knowledge about the facts of this case, and also because of her uncertain testimony.

I find that certain parts of Mr. Wilson's opinion and testimony are entitled to considerable weight. At the hearing, Mr. Wilson thoroughly explained the methodology behind each of his numerous calculations provided in his report. *See* TR 56-95. For example, he provided detailed explanations regarding the COLA increases and how each increase would have impacted Dr. Beltagui's wage rate and corresponding fringe benefits, which I find to be particularly credible, relevant, and helpful. *See* TR 63-64, 67-69; PX-2 at 2, 6-8. However, I afford no weight to Mr. Wilson's calculations regarding the earnings on the Retirement Plan because of his reliance on the S&P 500 rates of return, rather than the rates of return applicable to Dr. Beltagui's Retirement Plan. TR 71-72, 74-75, 80; PX-2 at 3-4, 6-8. In addition, his testimony as to the amount owed Dr. Beltagui related to the Deferred Comp Plan is entitled to little weight. Viewing his testimony as a whole, I find Mr. Wilson's opinion is overall credible and reliable.

I find Dr. Beltagui's testimony was credible with the exception of his testimony as to his contributions to the Deferred Compensation Plan. His testimony as to what he would have contributed to the Deferred Comp. Plan is inconsistent with his actual contributions during the period he was permitted to contribute to the plan. Thus, his testimony in this regard is unpersuasive.

#### **IV. ISSUES PRESENTED**

The principal issue in this case is whether WHD correctly determined the amount due to Dr. Beltagui in wages and benefits under the Act. TR 8-9. Resolution of the principle issue requires addressing several sub-issues:

1. Whether Dr. Beltagui has proper standing to bring a request for review of the Administrator's determination?
2. Whether Dr. Beltagui is entitled to receive the COLA increases DHHS offered to its employees in 2015, 2016, and 2017?
3. Whether the State of Nebraska was permitted to exclude Dr. Beltagui from participating in the retirement plan benefits, pursuant to 8 U.S.C. § 1622(a)?
4. Whether Dr. Beltagui is entitled to receive DHHS' matching contributions to the retirement plan?
5. Whether Dr. Beltagui is entitled to receive the amounts he would have contributed to the deferred compensation plan?
6. Whether Dr. Beltagui is entitled to receive the earnings and tax benefits, attributable to the retirement plan and deferred compensation plan?
7. Whether Dr. Beltagui is entitled to attorneys' fees and costs?

TR 9.

#### **V. STATUTORY AND REGULATORY FRAMEWORK**

The Act establishes a visa program, known as the H-1B program, that allows employers to hire nonimmigrant foreign workers to work in “specialty occupations”<sup>7</sup> that require specific knowledge and a relevant degree for prescribed periods of time. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700. An employer seeking to hire a nonimmigrant in an H-1B specialty occupation must first complete a Labor Condition Application (“LCA”) and file it with the United States Department of Labor (“DOL”). 20 C.F.R. § 655.700 *et seq.*

The employer’s LCA must specify the number of workers sought, the occupational classification in which they will be employed, and the wage rate and conditions under which they will be employed. 8 U.S.C. § 1182(n)(1)(D). In addition, the employer must attest that it is offering and will offer during the period of employment the “required wage.” 8 U.S.C. § 1182(n)(1)(A)(i)-(ii); 20 C.F.R. § 655.730(d).

The required wage rate is defined as “the rate of pay which is the higher of: (1) the actual wage for the specific employment in question; or (2) the prevailing wage rate.” 20 C.F.R. § 655.715. The “prevailing wage” is the “prevailing wage level for the occupational classification in the area of employment.” 20 C.F.R. § 655.731(a)(2). The “actual wage” is determined in one of two ways. 20 C.F.R. § 655.731(a)(1). If the employer has employees other than the H-1B nonimmigrant “with substantially similar experience and qualifications in the specific employment in question,” the actual wage is the amount paid to these other employees; however, if “no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B nonimmigrant by the employer.” 20 C.F.R. § 655.731(a)(1). The regulations further provide that “[w]here the employer’s pay system or scale provides for adjustments during the period of the LCA – e.g., cost of living increases . . . such adjustments shall be provided to similarly employed H-1B nonimmigrants. . . .” 20 C.F.R. § 655.731(a)(1).<sup>8</sup> An approved H-1B petition is valid for a period of up to three years. 8 C.F.R. § 214.2(h)(9)(iii)(A)(1).

Upon certification of the LCA by DOL, the employer must pay the required wage to the H-1B worker “cash in hand, free and clear, when due . . . .” 20 C.F.R. § 655.731(c)(1). For salaried employees, “wages will be due in prorated installments . . . paid no less often than monthly . . . .” 20 C.F.R. § 655.731(c)(4). Additionally, the employer is also required to pay the required wage and implement the working conditions set forth in the LCA, which includes hours, shifts, vacation periods, and certain fringe benefits. 8 U.S.C. § 1182(n)(2).

The DOL Administrator has broad authority to investigate an employer’s compliance with the representations and attestations on an LCA.<sup>9</sup> *See* 20 C.F.R. § 655.805. At the conclusion of an investigation, the Administrator issues a written decision setting forth his determination and any remedies assessed. *See* 20 C.F.R. §§ 655.805(a), 655.806(b), 655.815. The remedies for violations of the statute or regulations include payment of back wages to H-1B workers who were underpaid, debarment of the employer from future employment of aliens, civil money penalties, and other relief that the Department deems appropriate. 20 C.F.R. §§ 655.810, 655.855. If back wage obligations are found to be appropriate, the amount owed is defined as

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<sup>7</sup> “Specialty occupations” are occupations that require “theoretical and practical application of a body of highly specialized knowledge,” and “a bachelor’s or higher degree in the specific specialty (or its equivalent)” as a minimum for entry into the occupation in the United States. 8 U.S.C. § 1184(i)(1); 20 C.F.R. § 655.715.

<sup>8</sup> The term “similarly employed” means “[h]aving jobs requiring a substantially similar level of skills with the area of intended employment,” or “having substantially comparable jobs with employees outside of the area of intended employment.” 20 C.F.R. § 655.731(a)(2)(iii)(A)-(B).

<sup>9</sup> The provisions governing the complaint and investigation process are set forth in 20 C.F.R. §§ 655.805-815.

the difference between the amount the employee should have been paid and the amount actually paid. 20 C.F.R. § 655.810(a).

After the Administrator issues its determination, any interested party desiring review of the determination may request a hearing before an ALJ.<sup>10</sup> See 20 C.F.R. § 655.820. The burden of proof at the hearing lies with the prosecuting party—the party who requests a hearing before an ALJ. 20 C.F.R. § 655.820(b)(1); *Santiglia v. Sun Microsystems, Inc.*, ARB No. 03-0076, ALJ No. 2003-LCA-002, at 6 (ARB July 29, 2005). The regulation indicates that a hearing relates to “review of a[n Administrator’s] determination issued under §§ 655.805 and 655.815.” 20 C.F.R. § 655.820(a). Accordingly, an ALJ “may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator.” 20 C.F.R. § 655.840(b). An ALJ may also rule on fringe benefits, but the H-1B employee has the burden to provide sufficient evidence that the ALJ can make the requisite calculations. *Kuanysh Batyrbekov v. Barclays Capital (Barclays Grp. US Inc.)*, ARB No. 13-013, ALJ No. 2011-LCA-025, at 16 (ARB July 16, 2014).

## **VI. ANALYSIS AND CONCLUSIONS OF LAW**

### **A. Dr. Beltagui has Standing to Request Review of the Administrator’s Determination**

Under the Act, complaints must first be addressed by the Administrator WHD, and if Administrator receives a complaint but decides no investigation is warranted, then there is no right of appeal. 20 C.F.R. § 655.806(a)(2). When an investigation has been conducted, the Administrator will issue a written determination. 20 C.F.R. § 655.806(b). That determination letter must set forth the determination of the Administrator, the reasons for it, prescribe any remedies, and inform the parties of appeal rights. 20 C.F.R. § 655.815(c)(1)-(4). An appeal may only be made after WHD completes its investigation and issues its determination. 20 C.F.R. §§ 655.806(a)(2), 655.820(b)(1)-(2). The request must specify the issues contested, give the reasons the determination is in err, and must be received within 15 calendar days after the date of determination. 20 C.F.R. § 655.820(c) & (d).

There is no dispute that Dr. Beltagui satisfied all of the procedural prerequisites to request a review of the Administrator’s determination. Respondent, however, argues Dr. Beltagui does not have standing to request a review of the Administrator’s determination because the Administrator found in favor of Dr. Beltagui. Resp. Br. at 12. For the reasons discussed below, I find Dr. Beltagui has proper standing to request a review of the Administrator’s determination.

Under the Act’s regulations, a request for review of the Administrator’s determination may be made in two circumstances. 20 C.F.R. § 655.820(b). First, the complainant, or any other interested party, may request a hearing where the Administrator determines, after investigation, that there is no basis for finding that an employer has committed violations of the Act. 20 C.F.R. § 655.820(b)(1). Second, the employer, or any other interested party, may request a hearing where the Administrator determines, after investigation, that the employer has committed violations of the Act. 20 C.F.R. § 655.820(b)(2). An “interested party” is defined as “a person or entity who or which may be affected by the actions of an H-1B employer or by the outcome of a particular investigation and includes any person, organization, or entity who or which has notified the Department of his/her/its interest in the Administrator’s determination.” 20 C.F.R. § 655.715.

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<sup>10</sup> Under the regulations, no appeal is available if WHD declines to investigate a complaint, and an appeal may only be made after an investigation. 20 C.F.R. §§ 655.806(a)(2), 655.820(b)(1)-(2).

DHHS' argument that Dr. Beltagui does not have standing appears to stem from its own misunderstanding of the regulatory definitions. Contrary to DHHS' assertions, the definition of an "interested party" is not explicitly limited to those persons or entities who are *adversely* affected by the actions of H-1B employer or the outcome of a particular investigation. Resp. Br. at 12-13. In fact, the plain meaning<sup>11</sup> of the phrase "any interested party" broadly encompasses those persons or entities who *may be affected* by the actions of an H-1B employer or the outcome of a particular investigation. 20 C.F.R. § 655.715. Thus, whether a person or entity is adversely or favorably affected by the outcome of the Administrator's investigation has no bearing on whether they qualify as an "interested party." Therefore, I reject DHHS' position that a party who has received a favorable determination following the Administrator's investigation does not have standing as an "interested party" to request a review of the Administrator's determination.

Even assuming the phrase "interested party" is actually limited only to those persons or entities who have been adversely affected, as DHHS contends, Dr. Beltagui was adversely affected by the Administrator's determination. Following an investigation, the Administrator found DHHS committed several violations under the Act, and awarded Dr. Beltagui \$68,358.80 for DHHS' violations of the Act. *See* JX-1 at 5. While this determination certainly favors Dr. Beltagui, Dr. Beltagui asserts that the Administrator made errors in calculating the award, and the award should have been a larger amount. TR 21; JX-9 at 3. Therefore, Dr. Beltagui was adversely affected by the Administrator's determination as to the amount he was owed.

Additionally, the Administrator raises a compelling point in its brief: to find that Dr. Beltagui does not have standing to challenge the Administrator's determination "would illogically preclude allegedly adversely affected H-1B employees from pursuing their rights to additional wages and benefits to which they may otherwise be entitled under the H-1B [p]rogram [r]egulations." Admin. Br. at 3. This line of reasoning illustrates the most crucial aspect of this issue—to deny Dr. Beltagui the opportunity to request a review of the Administrator's determination because it was arguably favorable would effectively deny him the right to an appeal, which is statutorily provided to him under the Act. *See* 20 C.F.R. § 655.820(b). Therefore, I find Dr. Beltagui has standing as an "interested party."

Accordingly, I find Dr. Beltagui has proper standing to request a review of the Administrator's determination under 20 C.F.R. § 655.820(b)(2).

## **B. DHHS Violated Its required Wage Obligation**

The Administrator determined DHHS failed to pay Dr. Beltagui required wages in violation of 20 C.F.R. § 655.731. JX-1 at 2-3; JX-3 at 5. More specifically, the Administrator found the required wage rate owed to Dr. Beltagui correspondingly increased with each of the COLA increases DHHS provided to its workers in 2015, 2016 and 2017. JX-1 at 2-3. For the reasons discussed below, I affirm the Administrator's determination and find DHHS failed to pay Dr. Beltagui the required wage rate in violation of 20 C.F.R. § 655.731.

### *1. The Required Wage Rate*

As discussed above, H-1B employers are required to pay their H-1B nonimmigrant employees the required wage rate for the entire duration of the employees H-1B visa. *See* 20 C.F.R. § 655.731. On its LCA, DHHS listed a wage rate of \$300,000 per year, and indicated the

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<sup>11</sup> It is well-established that the plain meaning of statutory language "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

prevailing wage rate was \$103,888 per year. JX-2 at 72. The terms of the Employment Contract with Dr. Beltagui also indicate that DHHS agreed to pay Dr. Beltagui an actual wage that was “not to exceed \$300,000 (Three Hundred Thousand Dollars) per year.” JX-2 at 11, 14. More specifically, Dr. Beltagui, as a salaried exempt employee, was to be paid at a base hourly rate of \$144.23 per hour, and was not entitled to receive overtime. JX-2 at 11. Accordingly, I find the required wage rate was based upon the actual wage. *See* 20 C.F.R. § 655.731(a).

The actual wage is either the amount paid to “other employees with substantially similar experience and qualifications in the specific employment in question—*i.e.*, they have substantially the same duties and responsibilities as the H-1B nonimmigrant,” or “[w]here no such other employees exist at the place of employment,” the actual wage is the wage paid to the H-1B nonimmigrant by the employer. 20 C.F.R. § 655.731(a)(1).

In addressing the actual wage, DHHS suggests there were other “similarly situated” psychiatrists<sup>12</sup> employed by DHHS who did not receive COLAs. Because those other “similarly situated” psychiatrists did not receive COLAs Dr. Beltagui was not entitled to a COLA. *See* Resp. Br. at 15-16. However, the terms of the contracts between DHHS and these other referenced psychiatrists during the time Dr. Beltagui was employed by DHHS all included a specific provision that states “[t]he Contractor is an Independent Contractor and neither it nor any of its employees shall for any purpose be deemed employees of DHHS.” PP Br. at 9-10; *see* RX-1 at 7; RX-2 at 7; RX-4 at 7; RX-6 at 6; RX-7 at 6-7; RX-9 at 7; RX-11 at 7; RX-12 at 7; RX-13 at 7; RX-16 at 8; RX-17 at 8. Thus, the employment contracts establish that these other psychiatrists were independent contractors, and not employees of DHHS, unlike Dr. Beltagui. Even if the other psychiatrists had been employees of DHHS, none of them worked at the same psychiatric facility as Dr. Beltagui. *See, e.g.*, RX-1 at 1; RX-6 at 1; RX-11 at 1; RX-16 at 1. The evidence demonstrates that psychiatrists have different responsibilities at the Norfolk Regional Center as compared to any of the other facilities because of its unique patient population. *See* TR 14-16, 136; JX-2 at 74-75. Thus, I find the other psychiatrists referenced by DHHS were not similarly situated employees of DHHS employed at Dr. Beltagui’s place of employment.

Accordingly, I find that DHHS’ required wage obligation was based upon the actual wage, which was the wage DHHS paid to Dr. Beltagui. 20 C.F.R. § 655.731(a)(1).

## 2. *Dr. Beltagui was entitled to receive the COLA increases in 2015, 2016 and 2017*

The Administrator determined Dr. Beltagui was entitled to receive each of the COLA increases offered by DHHS to its employees in 2015, 2016 and 2017. JX-1 at 2-3. In the Joint Pre-Hearing Statement, DHHS did not contest the Administrator’s determination that Dr. Beltagui was entitled to receive the COLA increases. JX-9 at 2. However, at the hearing DHHS, for the first time, challenged Dr. Beltagui’s entitlement to the annual COLA increases. TR 126-127. DHHS argues that the terms of the Employment Contract prohibited Dr. Beltagui from receiving any of the COLA increases it provided to him. TR 126-127; Resp. Br. at 14. Although DHHS conceded this issue by failing to raise it in the Joint Pre-Hearing Statement, in an effort at completeness, I will nevertheless address this issue. For the reasons below, I find Dr. Beltagui was entitled to receive the COLA increases DHHS provided to its employees in 2015, 2016, and 2017.

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<sup>12</sup> These other psychiatrists are Drs. Sanat Roy, Bradley Rogers, Stephen Paden, and James Sorrell. *See* Resp. Br. at 14-15.

DHHS first argues Dr. Beltagui was not entitled to receive COLA increases because the Employment Contract “does not provide an increase . . . to account for COLAs,” and it unambiguously “placed a cap on the compensation [Dr. Beltagui] could receive from DHHS, which Dr. Beltagui never sought to renegotiate.” Resp. Br. at 14. DHHS, however, provides no legal basis to support its argument. *See* Resp. Br. at 14-15. Notwithstanding the terms of the Employment Contract, DHHS, at its own discretion, provided him with a 2.25% COLA increase in 2015 and a 2.4% COLA increase in 2016. TR 25; JX-2 at 32-36. More importantly, the ARB has declined to enforce the terms of private employment agreements, as private employment agreements are outside the scope of the Act and beyond the ARB’s jurisdiction. *See Jain v. Infobahn Technologies*, ARB No. 08-077, ALJ No. 2008-LCA-008, at 12-13 (ARB Oct. 30, 2009); *Kersten v. LaGard, Inc.*, ARB No. 06-111, ALJ No. 2005-LCA-017, at 9 (ARB Oct. 17, 2008). Therefore, DHHS’ argument that the terms of the Employment Contract prohibit Dr. Beltagui from receiving any COLA increases is unpersuasive and contrary to controlling ARB authority.

DHHS also claims that Dr. Beltagui was not entitled to receive any of the COLA increases because no other “similarly-situated employees as Dr. Beltagui received these adjustments.” Resp. Br. at 15-16. According to DHHS, providing Dr. Beltagui with the COLA increase would result in providing him with preferential treatment, rendering DHHS liable for “disparate treatment on the basis of national origin.” *See* Resp. Br. at 15-16. I am not persuaded by DHHS’ argument as I have already determined that the psychiatrists DHHS claims are similarly situated to Dr. Beltagui were independent contractors and not similarly situated employees of Dr. Beltagui.

Dr. Beltagui, however, testified DHHS also employed Dr. Stephen O’Neill as another psychiatrist at the Norfolk Regional Center. TR 31-33. According to Dr. Beltagui, Dr. O’Neill is a U.S. citizen, and he received the aforementioned COLA increases while working with Dr. Beltagui at DHHS. TR 31-33. There was no evidence provided as to Dr. O’Neill’s employment arrangement with DHHS. However, Dr. Beltagui’s testimony that Dr. O’Neill is a U.S. citizen, received the COLA increase each year, and was the only other psychiatrist working with him at the Norfolk Regional Center was not contradicted, and therefore supports a finding that Dr. O’Neill was a similarly situated employee of Dr. Beltagui. TR 14-16; *see* JX-2 at 12, 74-75, 131.

The evidence establishes that DHHS provided COLA increases to certain employees in 2015, 2016, and 2017. JX-2 at 32, 35, 39. The notices DHHS provided to its employees about the COLA increases provided that non-classified discretionary employees, such as Dr. Beltagui, would receive a COLA increase “as determined by the appropriate appointing authority.” JX-2 at 32, 35, 39. Indeed, Dr. Beltagui received notice in both 2015 and 2016 from the “appropriate appointing authority” that he was eligible for and would receive COLA increases. JX-2 at 33-34, 36. He continued to receive the COLA increases until August 19, 2016, when DHHS changed course and determined Dr. Beltagui was never eligible for such pay adjustments and requested he refund the amounts paid out to him. JX-2 at 36.

Dr. Beltagui also alleges that if DHHS did not earlier exclude him from consideration for COLA increases, then “based on the practice of DHHS in years 2015 and 2016 as to [his] COLA increases, [he] likely would have received a year 2017 COLA increase to his salary.” PP Br. at 12, n. 2. Unlike in 2015 and 2016, Dr. Beltagui did not actually receive a COLA increase in 2017. JX-2 at 33-34, 36. However, the notice DHHS provided to its employees in 2017 states

that non-classified discretionary employees, such as Dr. Beltagui, would receive the 1% COLA increase at the discretion of the proper appointing authority. JX-2 at 39.

The H-1B visa program regulations provide that “[w]here the employer’s pay system or scale provides for adjustments during the period of the LCA—e.g., cost of living increases . . .—such adjustments shall be provided to similarly employed H-1B nonimmigrants.” 20 C.F.R. § 655.731(a)(1). The plain language of the H-1B regulations demonstrate that Dr. Beltagui was entitled to receive the cost of living adjustment DHHS paid to similarly situated employees. Therefore, I find DHHS was required to provide Dr. Beltagui the COLA increases it paid to other similarly situated employees of DHHS in 2015, 2016 and 2017, pursuant to 20 C.F.R. § 655.731(a)(1).

Accordingly, I find Dr. Beltagui was entitled to receive COLA increases in 2015, 2016, and 2017, pursuant to 20 C.F.R. § 655.731(a)(1).

### *3. Each of the COLA increases correspondingly increased the Actual Wage Rate*

As discussed above, DHHS’ required wage obligation was based upon the actual wage DHHS paid Dr. Beltagui. 20 C.F.R. § 655.731(a)(1). Each time DHHS provided Dr. Beltagui with a COLA increase, it correspondingly increased the actual wage it paid him. JX-2 at 11, 32-35. Because DHHS’ required wage obligation was based on the actual wage it paid Dr. Beltagui, the COLA increases to his actual wage also increased its own required wage obligation. 20 C.F.R. § 655.731(a); *see Vojtisek-Low & Wage & Hour Div. v. Clear Air Tech.*, ARB No. 07-097, ALJ No. 2006-LCA-0009, at 8 (ARB July 30, 2009). Therefore, I find the required wage rate owed to Dr. Beltagui increased in accordance with each of the COLA increases he received.

Mr. Wilson thoroughly explained how he calculated the wage owed to Dr. Beltagui had he received the COLA adjustment. PX-2 at 1; TR 62-63. Therefore, I accept Mr. Wilson’s calculations as accurate and reflective of the required wage rate had Dr. Beltagui received the COLA increases in each year. At the beginning of Dr. Beltagui’s employment with DHHS, he received an actual wage of \$144.23 per hour. JX-2 at 11; PX-2 at 1. Accordingly, the required wage rate was originally set at \$144.23 per hour. 20 C.F.R. § 655.731(a). On July 1, 2015, DHHS provided Dr. Beltagui with a 2.25% COLA increase to his salary, which resulted in an increase to the actual wage he was paid to a rate of \$147.48 per hour. JX-2 at 32-34; TR 62-63; PX-2 at 1. Accordingly, the required wage rate was likewise increased to a rate of \$147.48 per hour. 20 C.F.R. § 655.731(a). On July 1, 2016, DHHS once again provided Dr. Beltagui with a 2.4% COLA increase to his salary, thereby increasing his actual wage rate—and therefore its required wage obligation—to \$151.01 per hour. JX-2 at 35; TR 63; PX-2 at 1; 20 C.F.R. § 655.731(a).

As discussed above, DHHS was required under the regulations to provide Dr. Beltagui with the 1% COLA increase to his salary on July 1, 2017. 20 C.F.R. § 655.731(a)(1); *see* JX-2 at 39. The 1% COLA increase would have resulted in an actual wage of \$152.52 per hour beginning on July 1, 2017. *See* JX-2 at 35, 39; TR 63; PX-2 at 1. Accordingly, the required wage rate also increased to a rate of \$152.52 per hour. 20 C.F.R. § 655.731(a).

My findings regarding the applicable required wage rate for specific periods of employment are based upon Mr. Wilson’s calculations, and are summarized as follows:

- From August 1, 2014 to June 30, 2015, the required wage rate was \$144.23 per hour.
- From July 1, 2015 to June 30, 2016, the required wage rate was \$147.48 per hour.

- From July 1, 2016 to June 30, 2017, the required wage rate was \$151.01 per hour.
- From July 1, 2017 to July 31, 2017, the required wage rate was \$152.52 per hour.

PX-2 at 1; TR 59-60, 62-63.

#### 4. *DHHS made unauthorized deductions from Dr. Beltagui's Wages*

The regulations specify three types of deductions that an employer may use to reduce an H-1B worker's cash wage below that of the required wage rate.<sup>13</sup> None of which are applicable here.

On August 19, 2016, DHHS notified Dr. Beltagui that he received the COLA increases in 2015 and 2016 in "error," and instructed him to repay \$8,043.85, the amount he was allegedly overpaid by DHHS. JX-2 at 36. In an attempt to recoup the amount it allegedly overpaid Dr. Beltagui, DHHS deducted \$8,043.85 from his wages in two of his paychecks. TR at 26; JX-2 at 37, 47; JX-9 at 6. Such a deduction does not meet any of the criteria set forth above; hence, the deduction does not qualify as an "authorized" deduction under 20 C.F.R. § 655.731(c)(9). Therefore, I find DHHS made two unauthorized deductions in violation of the regulations. *See* 20 C.F.R. § 655.731(c)(9).

The regulations provide that any unauthorized deductions taken from an H-1B worker's wages will be considered as a non-payment of that amount of wages, and will result in back wage assessment. 20 C.F.R. § 655.731(c)(11). Therefore, I find DHHS' unauthorized deductions are considered "non-payment of that amount of wages." 20 C.F.R. § 655.731(c)(11).<sup>14</sup> Accordingly, the \$8,043.85 owed to Dr. Beltagui for DHHS' unauthorized deductions will be included in the amounts Dr. Beltagui is entitled to receive as back wages, as discussed below.

#### 5. *DHHS violated its required wage obligation*

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<sup>13</sup> In particular, 20 C.F.R. § 655.731(c)(9) defines an "authorized deduction" as "a deduction from wages in complete compliance with one of the following three sets of criteria":

- (i) a deduction which is required by law (e.g., tax withholding);
- (ii) a deduction which is authorized by a collective bargaining agreement, or is reasonable and customary in the occupation and/or area of employment (e.g., deduction for retirement fund contribution), except that the deduction may not recoup a business expense of the employer; the deduction must have been revealed to the worker prior to the commencement of the employment; and, if there are U.S. workers of the employer, the deduction must also be made against their wages; or
- (iii) a deduction which meets the following requirements:
  - a. is made in accordance with a voluntary, written authorization by the employee;
  - b. is for a matter principally for the benefit of the employee;
  - c. is not a recoupment of the employer's business expense, including expenses related to the employer's responsibilities under the H-1B program;
  - d. is an amount which does not exceed the fair market value or actual cost of the matter covered, whichever is lower (and the employer must document cost and value); and
  - e. does not exceed the limits for garnishment of wages under federal law.

20 C.F.R. § 655.731(c)(9).

<sup>14</sup> As a result of this non-payment of wages, DHHS paid Dr. Beltagui at a rate of \$144.23 per hour in each of the pay periods from August 1, 2014 to July 31, 2017.

The regulations specify an H-1B employer must pay the H-1B nonimmigrant the required wage rate for the entire duration of the H-1B visa. *See* 20 C.F.R. §§ 655.731, 655.731(a). In light of the above discussion, I find DHHS failed to pay Dr. Beltagui the required wage rate from July 1, 2015 to July 31, 2017 by denying the COLA increases, in violation of 20 C.F.R. § 655.731(a)(1). Therefore, I affirm the Administrator’s determination that Dr. Beltagui is entitled to back wages for DHHS’ failure to pay Dr. Beltagui the required wage rate during the following time periods: July 1, 2015 to June 30, 2016; July 1, 2016 to June 30, 2017; and July 1, 2017 to July 31, 2017. JX-1 at 2-3.

Under 20 C.F.R. § 655.810(a), remedies for failure to pay required wages include the payment of back wages, which “shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to (or with respect to) such nonimmigrant(s).” The Administrator determined Dr. Beltagui was entitled to receive award totaling \$68,358.80. JX-1 at 5. This amount included \$22,372.01 in back wages and \$45,986.79 for fringe benefits improperly withheld. JX-1 at 5; JX-2 at 257; JX 9 at 6 (stip. 19). Although the Administrator provided examples of how it calculated the back wages, the narrative report lacked any real detail or specificity as to how it made its calculations. *See* JX-1 at 4-5. Alternatively, Mr. Wilson, Dr. Beltagui’s expert, provided a detailed report and testified at length about his calculations. *See* PX-2 at 1, 6-8; TR 54-55, 59-64. I find Mr. Wilson’s calculations regarding the back wages owed to Dr. Beltagui are credible and account for the COLA increases Dr. Beltagui was entitled to receive. Therefore, I accept Mr. Wilson’s calculations regarding the amount of back wages owed to Dr. Beltagui for DHHS’ failure to pay him the required wage rate and I adopt them as my findings.

Accordingly, I find DHHS owes Dr. Beltagui back wages in the amount of \$23,421.83<sup>15</sup> for the time periods between July 1, 2015, and July 31, 2017. PX-2 at 2, 8.

**C. DHHS is Required to Offer the Same Fringe Benefits Under the Retirement and Deferred Comp. Plans to Dr. Beltagui On the Same Basis and Under the Same Criteria as Offered to U.S. Workers**

*1. DHHS impermissibly excluded Dr. Beltagui from participating in the Retirement Plan and the Deferred Comp. Plan offered to U.S. workers.*

The Administrator determined DHHS failed to either offer equal benefits or equal eligibility for benefits or both in violation of 20 C.F.R. § 655.731(c)(3). JX-1 at 5; JX-3 at 5. The parties disagree as to whether Dr. Beltagui was entitled to participate in the Retirement Plan and the Deferred Comp. Plan offered by DHHS to its employees.

DHHS asserts the two plans are considered State public benefits, as defined under 8 U.S.C. § 1621(c)(1). It argues Dr. Beltagui was not entitled to receive such Nebraska State public benefits “because federal statutory schemes permit states to limit employees eligible to public benefits and contrary federal regulations are preempted.” *See* Resp. Br. at 16-18. Specifically, DHHS cites to 8 U.S.C. § 1622(a), and claims the purpose of the statute is to allow States to make their own determinations regarding alien eligibility for State public benefits. Resp. Br. at 16-17. Acting under this understanding of the statute, the Nebraska state legislature specifically limited eligibility for participation in the Retirement Plan and Deferred Comp. Plan

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<sup>15</sup> This amount also encompasses the amount DHHS owes Dr. Beltagui for the unauthorized deductions, and the adjustments for the withholding of COLA increases to his pay for paid holiday leave, paid sick leave, and paid vacation leave. *See* PX-2 at 2-3.

to U.S. citizens and qualified aliens. *See* Neb. Rev. Stat. §§ 84-1307(3); 84-1504(8); Resp. Br. at 18.

Alternatively, Dr. Beltagui claims the benefits he seeks are not considered “State public benefits” because of a “carve out” to the definition of “State public benefits” under 8 U.S.C. § 1621(c)(2)(A). PP Br. at 22. Therefore, Dr. Beltagui argues DHHS did not have authority under § 1622(a) to exclude him from participating in the plans. PP Br. at 22. Dr. Beltagui also asserts DHHS’ interpretation of the statute is “contrary to generally accepted rules of statutory construction.” PP BR. at 22-23. Moreover, Dr. Beltagui asserts Section 1182(n)(2)(C)(viii)<sup>16</sup> of the Act plainly requires an H-1B employer to offer and provide to H-1B nonimmigrants “benefits and eligibility for benefits . . . on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.” PP Br. at 23.

Resolution of the issue of whether DHHS is required to provide Dr. Beltagui with certain fringe benefits, namely, participation in the Retirement Plan and Deferred Comp. Plan offered to U.S. workers, requires a discussion of the statutes relied upon and interpreted by DHHS and Dr. Beltagui. Congress enacted 8 U.S.C. § 1182(n)(2)(C)(viii) as part of the American Competitiveness and Workforce Improvement Act of 1998, which was included in an amendment to the Immigration and Nationality Act of 1952, and addresses an employer’s responsibility for compensating nonimmigrant workers hired under the H-1B visa program. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, tit. IV, § 411(a), 112 Stat. 2681-641 to -657 (1998). Section 8 U.S.C. §1182(n)(2)(C)(viii) of the Act provides an H-1B employer must provide nonimmigrants “benefits and eligibility for benefits (including . . .the opportunity to participate in retirement and savings plans . . .) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.”

Congress enacted 8 U.S.C. § 1622(a) as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which is intended to protect states from having to expend public benefits and resources to support immigrants who are incapable of meeting their basic needs. *See* 8 U.S.C. § 1601; *see also* Pub. L. 104-193, tit. IV, § 412, 110 Stat. 2105-269 to -270 (1996). In relevant part, 8 U.S.C. § 1622(a) states, “[n]otwithstanding any other provision of law and except as provided in subsection (b), a State is authorized to determine the eligibility for any State public benefits of . . . a nonimmigrant under the Immigration and Nationality Act. . . .” 8 U.S.C. § 1622(a). In enacting this provision, Congress declared the immigration policy of the United States was that aliens within the United States ought not to depend upon public resources to meet their basic needs, but rather, are self-sufficient and/or depend upon family members or sponsors. 8 U.S.C. §§ 1601(1), (2)(A). In recognition of the fact that aliens were increasingly relying upon public assistance, and burdening the public benefits system, Congress intended to remove the incentive for immigration provided by the availability of public benefits. 8 U.S.C. §§ 1601(2)(B), (3), (4), (5). Thus, Congress afforded the States the authority to set eligibility requirements for State public benefits for aliens. 8 U.S.C. § 1601(7).

Relying on 8 U.S.C. § 1622(a), DHHS argues Nebraska limited eligibility for State public benefits. Resp. Br. at 16-18. The term “State or local public benefits,” as used in § 1622(a), is defined under § 1621(c)(1), which provides:

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<sup>16</sup> In his brief, Dr. Beltagui incorrectly cites to “8 U.S.C. § 1182(c)(viii).” PP Br. at 23. I view this incorrect citation as a simple typing error.

(1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term “State or local public benefit” means-

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual . . . by an agency of a State or local government or by appropriated funds of a State or local government.

8 U.S.C. §§ 1621(c)(1)(A), (B). The term “State or local public benefits” broadly includes “any retirement” benefits for which payments are provided to an individual by an agency of the state. *See* § 1621(c)(1)(B). The Retirement Plan in this case “is designed to provide retirement benefits in recognition of service to the state of Nebraska. . . .” JX-7 at 4. Similarly, the Deferred Comp. Plan in this case “is designed to provide employees a supplementary retirement income.” JX-8 at 4. Thus, the Retirement Plan and the Deferred Comp. Plan fall within the broad category of “any retirement” benefits under the definition of “State public benefits” in § 1621(c)(1)(B).

However, as Dr. Beltagui asserts, 8 U.S.C. § 1621(c)(2)(A) acts as a “carve out” to the broad definition of “State public benefits.” PP Br. at 22. In relevant part, § 1621(c)(2)(A) provides:

(2) Such term shall not apply—

(A) to any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States. . . .

8 U.S.C. § 1621(c)(2)(A).

Dr. Beltagui accepted an offer of employment on November 12, 2013, as a “full time, permanent staff psychiatrist” with DHHS.<sup>17</sup> JX-2 at 14. In an e-mail to Dr. Beltagui dated August 5, 2013, Mr. William Gibson, CEO of DHHS, attached a “summary page of the benefit package” for DHHS employees, which specifically included “Retirement Plan” and “Deferred Compensation Plan” as part of the benefit package. JX-2 at 16-17. Additionally, the Retirement Plan and the Deferred Comp. Plan handbooks allow and/or require full-time employees to participate in the plans. *See* JX-7 at 7; JX-8 at 7. For that reason, I find the benefits Dr. Beltagui seeks in this case—participation in the Retirement Plan and the Deferred Comp. Plan offered to DHHS employees—are encompassed as part of his contract for employment with DHHS. Accordingly, I find the retirement plan benefits Dr. Beltagui claims entitlement to in this case do not qualify as “State public benefits,” pursuant to the exception provided at 8 U.S.C. § 1621(c)(2)(A). Therefore, I reject DHHS’ argument that Dr. Beltagui was not entitled to participate in the retirement plans offered by DHHS to its employees.

Under 8 U.S.C. § 1182(n)(2)(C)(viii), an employer who has filed an application to hire a nonimmigrant under the H-1B visa program for a specialty occupation, as in the present matter, must offer the H-1B nonimmigrant “benefits and eligibility for benefits (including . . . the

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<sup>17</sup> As an H-1B visa holder, Dr. Beltagui is a “nonimmigrant whose visa for entry is related to such employment in the United States.” *See* § 1621(c)(2)(A).

opportunity to participate in retirement and savings plans . . . ) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.”<sup>18</sup> The H-1B program allows employers to hire an H-1B worker in specialty occupations, provided that U.S. workers are not being displaced as a result of the employer’s decision to hire the H-1B worker. 144 Cong. Rec. S12750, S12752 (Oct. 21, 1998). In an effort to ensure U.S. workers are not disadvantaged in favor of aliens, the statute requires all H-1B employers to compensate and provide fringe benefits to H-1B nonimmigrant employees on the same basis as provided to U.S. workers.<sup>19</sup> 144 Cong. Rec. S12753 (Oct. 21, 1998).

DHHS, although an agency of the State of Nebraska, elected to participate in the H-1B program by completing the LCA as the employer seeking to hire Dr. Beltagui, a nonimmigrant worker. JX-2 at 48-76. DHHS, as an H-1B employer, is required to comply with the Act and the implementing regulations like any other H-1B employer. 8 U.S.C. § 1182(n). Thus, DHHS was required to offer and provide Dr. Beltagui with the same benefits and eligibility for benefits, including the opportunity to participate in retirement and savings plans, as it offers to its U.S. workers. 8 U.S.C. § 1182(n)(2)(C)(viii); 20 C.F.R. § 655.731(c)(3). If H-1B employers, such as DHHS, are permitted to pay H-1B nonimmigrant employees less or offer less generous fringe benefits to such nonimmigrant employees, then U.S. workers would be at a competitive disadvantage as compared to the nonimmigrants. Such a result is contrary to the purpose of the Act and the H-1B visa program requirements. 144 Cong. Rec. S12750, S12752 (Oct. 21, 1998). Likewise, allowing State agencies who are H-1B employers to exclude H-1B nonimmigrant employees from eligibility for the employment related benefits it offers to its U.S. workers would contradict the plain language of § 1182(n)(2)(C)(viii). Accordingly, DHHS, as an H-1B employer, is under a statutory obligation to offer Dr. Beltagui the same opportunity to participate in the Retirement Plan and the Deferred Comp. Plan as it does to its U.S. workers. 8 U.S.C. § 1182(n)(2)(C)(vii).

DHHS’ interpretation of § 1622 as permitting it to exclude H-1B employees from eligibility for participation in retirement plans offered to similarly situated employees would effectively nullify § 1182(n)(2)(C)(viii) of the Act. The Supreme Court has stated “[w]hen confronted with two Acts of Congress allegedly touching on the same topic, this Court is not ‘at liberty to pick and choose among congressional enactments’ and must instead ‘strive to give effect to both.’”<sup>20</sup> *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1624 (2018) (quoting *Morton v.*

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<sup>18</sup> The regulation at 20 C.F.R. § 655.731(c)(3) implements the statutory provision.

<sup>19</sup> “This obligation is only an obligation to make benefits available to an H-1B worker if an employer would make those benefits available to the H-1B worker if he or she were a U.S. worker.” 144 Cong. Rec. S12753 (Oct. 21, 1998).

<sup>20</sup> In *Morton v. Mancari*, the Supreme Court was faced with the issue of determining whether the employment preference provided to “qualified Indians” under the Indian Reorganization Act of 1934 (also known as the Wheeler-Howard Act, 48 Stat. 984, 25 U.S.C. § 461 *et. seq.*) was repealed by implication by the passage of the Equal Employment Opportunity Act of 1972. See *Morton*, 417 U.S. at 537, 548. The Supreme Court held it did not, and laid out four specific reasons for their holding. See *Morton*, 417 U.S. at 547-551. As part of the fourth reason, the Supreme Court looked to the intent of Congress and found the Indian preference was a “longstanding, important component of the Government’s Indian program,” while the anti-discrimination provision was “aimed at alleviating minority discrimination in employment, [and] obviously designed to deal with an entirely different and, indeed, opposite problem.” *Morton*, 417 U.S. at 550. Furthermore, the Supreme Court noted “the Indian preference statute is a specific provision applying to a very specific situation” and “[t]he 1972 Act, on the other hand, is of general application.” *Id.* Accordingly, “[w]here there is no clear intention otherwise, a specific statute will not be

*Mancari*, 417 U.S. 535, 551 (1974)). In construing 8 U.S.C. § 1622(a) as permitting States to prevent aliens from becoming a drain on the public purse, through use of State public benefits, while also precluding States, acting as H-1B employers, from using the same provision to deny its H-1B nonimmigrant employees benefits or eligibility for benefits as offered to its U.S. employees as required under 8 U.S.C. § 1182(n)(2)(C)(viii), gives effect to both statutory provisions § 1622(a) and § 1182(n)(2)(C)(viii). See *Epic Systems Corp.*, 138 S.Ct. at 1624. This construction is also consistent with the overarching purposes of the two statutes. Dr. Beltagui is exactly the type of alien the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 supports—a self-sufficient alien who does not depend on public resources to meet his needs. See 8 U.S.C. § 1601(2)(A). Although the term “State public benefits” is broadly defined and applies to general welfare and public assistance benefits, there is no reference to any benefits the State, acting as an employer, provides to its employees. See § 1621(c)(1). In contrast, § 1182(n)(2)(C)(viii) of the Act squarely addresses the benefits H-1B employers must provide to their H-1B nonimmigrant employees. See § 1182(n)(2)(C)(viii). The requirements set forth in § 1182(n)(2)(C)(viii) ensures U.S. workers are not disadvantaged by allowing H-1B employers to hire H-1B nonimmigrant workers at less expensive than U.S. workers. 144 Cong. Rec. S12753 (Oct. 21, 1998).

In sum, I find 8 U.S.C. § 1622(a) does not grant DHHS the authority to exclude Dr. Beltagui from participating in the Retirement Plan and the Deferred Comp. Plan. I also find DHHS was required, pursuant to 8 U.S.C. § 1182(n)(2)(C)(viii), to offer Dr. Beltagui the same benefits and eligibility for benefits as it does to its U.S. employees. Accordingly, I find DHHS violated the Act when it removed and excluded Dr. Beltagui from participating in the Retirement Plan and the Deferred Comp. Plan. 8 U.S.C. § 1182(n)(2)(C)(viii); 20 C.F.R. § 655.731(c)(3).

2. *Dr. Beltagui’s entitlement to an award for the lost fringe benefits related to the Retirement Plan*

Dr. Beltagui first argues he would have had a vested interest in the total amount of matching contributions DHHS would have made to his Retirement Plan account. PP Br. at 14-17. He also claims he is entitled to receive the earnings from his contributions and DHHS’ matching contributions to the Retirement Plan account at the 5% rate of return guaranteed under the Retirement Plan. PP Br. at 17-18. I will discuss each issue in turn.

A. Dr. Beltagui is entitled to receive the matching contributions DHHS would have made to his Retirement Plan account

The Administrator determined DHHS violated the Act by failing to provide him with the matching contributions DHHS would have made under the terms of the Retirement Plan. JX-1 at 4. Dr. Beltagui agrees with this finding, but claims that “the Administrator did not accurately or adequately calculate the wages and benefits” due to him as a result of the violation. PP Br. at 13-14. DHHS responds and argues that Dr. Beltagui did not have a vested interest in the matching contributions it would have made to his Retirement Plan account.<sup>21</sup> Resp. Br. at 22-23. Specifically, DHHS claims that Dr. Beltagui’s interest in the matching contributions did not vest because he was employed by DHHS from August 1, 2014, to July 31, 2017, and, as a result, he was “not a plan participant for more than three (3) years.” Resp. Br. at 23.

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controlled or nullified by a general one, regardless of the priority of enactment.” *Morton*, 417 U.S. 550-551 (citations omitted).

<sup>21</sup> The Administrator does not address this issue in its post-hearing brief.

Dr. Beltagui suggests that DHHS' argument is "based on a strained interpretation" of the Retirement Plan's vesting requirement. PP Br. at 14. The terms of the Retirement Plan provide that "[v]esting occurs after three years of plan participation . . ." and "[w]hen a non-vested plan member ceases employment, his/her employer contributions are forfeited." JX-7 at 11. Based on its argument, DHHS interprets this requirement as requiring participation in the Retirement Plan for more than three years. See Resp. Br. at 23. This interpretation, however, does not accurately represent what the terms of the Retirement Plan plainly require for a participant to have a vested interest in matching contributions. Instead, the terms of the Retirement Plan provide that a participant's interest in matching contributions vests after the participant has participated in the Retirement Plan for three years. See JX-7 at 11. Stated differently, a participant does not need to participate in the Retirement Plan for more than three years to have a vested interest in their employer's matching contributions.

Dr. Beltagui was employed by DHHS for a three year term, beginning August 1, 2014, continuing through July 31, 2017. JX-2 at 11. Accordingly, Dr. Beltagui was effectively enrolled in the Retirement Plan on August 1, 2014, the date he was hired. See JX-2 at 11; JX-7 at 7. As a "permanent, full-time employee" at DHHS, Dr. Beltagui was required to participate in the Retirement Plan. See JX-7 at 7. Had DHHS not improperly excluded him from participating in the Retirement Plan in 2016, Dr. Beltagui would have continued to participate and been eligible for matching contributions from DHHS. Thus, I find Dr. Beltagui would have a vested interest in DHHS' matching contributions if DHHS did not improperly exclude him from plan participation in 2016.<sup>22</sup> Therefore, I affirm the Administrator's determination that DHHS violated 20 C.F.R. § 655.731(c)(3) for failing to provide him with its matching contributions to his Retirement Plan account.

Accordingly, because Dr. Beltagui did not receive any payment for the matching contributions, I find Dr. Beltagui is entitled to receive the full amount of matching contributions DHHS would have made to his Retirement Plan, at the matching rate of 156% of Dr. Beltagui's contributions. See 20 C.F.R. § 655.810(a).

The Administrator's calculations as to the matching contributions DHHS would have made are unclear. In the "Summary of Unpaid Wages," the Administrator appears to begin the matching contribution calculations as of July 1, 2015. JX-2 at 44. However, under the terms of the Retirement Plan, DHHS would have been required to make matching contributions based on every contribution Dr. Beltagui made. JX-7 at 7. Additionally, it is unclear whether Administrator's calculations are based on Dr. Beltagui's adjusted wage rate to account for the COLA increases he was entitled to receive. JX-2 at 40-44. The Administrator's calculations regarding the amount owed to Dr. Beltagui for the matching contributions DHHS would have made are therefore inaccurate and unreliable.

Mr. Wilson's calculations for the total amounts DHHS would have contributed to the Retirement Plan as matching contributions are credible and uncontroverted. See PX-2 at 2-3; 6-8. His report and testimony are sufficiently detailed, and together provide a comprehensive

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<sup>22</sup> In his brief, Dr. Beltagui also asserts that if DHHS' interpretation was correct, and if DHHS did not wrongfully exclude Dr. Beltagui from plan participation, then DHHS would have offered him the opportunity to participate in the Retirement Plan "with an expectation" that his interest in its matching contributions would never vest. See PP Br. at 16-17. Dr. Beltagui further claims that it would be "difficult to see how such an offer could be considered 'in good faith' and how it would result in [his] 'actual receipt of the benefits. . . .'" 20 C.F.R. § 655.731(c)(3)(i). PP Br. at 17. I need not address this argument as I have found Dr. Beltagui has a vested interest in the matching contributions.

explanation as to how his calculations for the matching contributions were made. TR 68-69; PX-2 at 3, 6-8. Accordingly, I accept Mr. Wilson's calculations as to the amount of matching contributions DHHS would have made to Dr. Beltagui's Retirement Plan, and I adopt them as part of my findings.

Therefore, I find DHHS owes Dr. Beltagui an amount of \$63,375.22 for the matching contributions it would have made to his Retirement Plan. PX-2 at 3, 6-8.

B. Dr. Beltagui is entitled to receive the earnings on the contributions made to his Retirement Plan account

Under the Act, the earnings generated from the contributions to the Retirement Plan account would properly be considered a component of fringe benefits attributable to his participation in the Retirement Plan. 20 C.F.R. § 655.731(c)(3). By improperly excluding Dr. Beltagui from participating in the Retirement Plan, DHHS deprived him of receiving the full amount of earnings that both his contributions and DHHS' matching contributions to the Retirement Plan would have generated. Therefore, I find DHHS violated 20 C.F.R. § 655.731(c)(3) by failing to offer Dr. Beltagui the same fringe benefits, namely, the earnings on the Retirement Plan contributions, on the same basis as it offered to its U.S. workers.

Pursuant to 20 C.F.R. § 655.810(a), Dr. Beltagui is entitled to receive an award for the lost earnings on the Retirement Plan contributions in an amount that is equal to "the difference between the amount that should have been paid and the amount that actually was paid to (or with respect to) such nonimmigrant(s)." 20 C.F.R. § 655.810(a). However, it is challenging to calculate this amount because the parties are unable to agree to the dollar amount Dr. Beltagui received as a refund for his Retirement Plan contributions, and the amount of earnings that both his contributions and DHHS' matching contributions would have generated is not clear.

The parties dispute the amount Dr. Beltagui received from DHHS as a refund for his Retirement Plan contributions. JX-9 at 7-8. Specifically, DHHS claims it refunded Dr. Beltagui \$27,835.12, whereas Dr. Beltagui claims he received a refund in the amount of \$28,095.31. JX-9 at 7-8; Resp. Br. at 21. In total, the parties' positions differ by a mere \$224.19.

There is no dispute that Dr. Beltagui received the refund for his Retirement Plan contributions, including the earnings generated therefrom, in December of 2016. TR 34, 118; JX-9 at 7-8; Resp. Br. at 21. In the pay check dated 12/23/2016, Dr. Beltagui received \$5,123.03 for "Retirement." JX-2 at 145, 202. In the pay check dated 12/29/2016, Dr. Beltagui received \$10,216.28 for "Retirement." JX-2 at 147, 201. In the pay check dated 12/30/2016, Dr. Beltagui received \$12,720.00 for "Retirement." JX-2 at 146, 201. In total, these pay stubs reflect Dr. Beltagui received an amount of \$28,059.31 refunded from his Retirement Plan. Additionally, Mr. Wilson relied on these same pay stubs from December of 2016 to calculate the total amount of Retirement Plan contributions refunded to Dr. Beltagui. See PX-2 at 2, 8. Mr. Wilson also found \$28,059.31 was the total amount Dr. Beltagui received as a refund for his contributions. PX-2 at 2, 8. Therefore, I find the pay stubs dated 12/23/2016, 12/29/2016, and 12/30/2016, are the most reliable pieces of evidence available to determine the amount Dr. Beltagui actually received as a refund for his Retirement Plan contributions. JX-2 at 145-147, 201-202.<sup>23</sup> I find

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<sup>23</sup> It is unclear how DHHS determined that it paid Dr. Beltagui \$27,835.12 as a refund for his contributions to the Retirement Plan and the earnings generated therefrom. Resp. Br. at 21. This figure is inconsistent with the pay stub information DHHS cites to in its brief, as discussed above.

Dr. Beltagui received \$28,059.31<sup>24</sup> as a refund for his Retirement Plan contributions and the earnings generated from his contributions. TR 34, 118; Resp. Br. at 21.

In Mr. Wilson's report, Column H represents the amounts Dr. Beltagui would have contributed to the Retirement Plan per pay period. PX-2 at 6-8. He explained that these amounts reflect what the contributions would have been at 4.8% of Dr. Beltagui's gross wages, and account for the COLA increases Dr. Beltagui was entitled to receive. TR 67; PX-2 at 2. In fact, the pay stubs in the record include the amounts Dr. Beltagui contributed to the Retirement Plan, and those amounts are the same as the amounts listed in Column H of Mr. Wilson's report. See JX-2 at 206-222; PX-2 at 6-8. Therefore, I find the amounts listed in Column H of Mr. Wilson's report accurately reflect the contributions Dr. Beltagui actually made between 11/2/2014 and 8/21/2016. In total, the amount of the contributions listed in Column H of Mr. Wilson's report equal \$26,288.53. See PX-2 at 6-7. Accordingly, I find Dr. Beltagui made \$26,288.53 in total contributions before DHHS removed him from the Retirement Plan.

Finally, in order to calculate the amount of earnings Dr. Beltagui received as a refund from DHHS, I will deduct the amount Dr. Beltagui contributed to the Retirement Plan (\$26,288.53), from the total amount DHHS paid Dr. Beltagui as a refund for his contributions to the Retirement Plan (\$28,059.31). Based on these calculations, I find DHHS paid Dr. Beltagui in the amount of \$1,770.78 for the earnings generated from Dr. Beltagui's contributions to the Retirement Plan.

In order to calculate the amount DHHS owes Dr. Beltagui for the lost earnings from all of the contributions, I must first determine the earnings his contributions, as well as DHHS' matching contributions would have generated. I cannot rely upon Mr. Wilson's calculations for earnings because he admittedly failed to use the 5% rate of return provided for by the Retirement Plan. . TR 72, 74-78; PX-2 at 3, 6-8.

Notwithstanding Mr. Wilson's calculation errors, I find there is sufficient evidence that permits me to make the requisite calculations of earnings Dr. Beltagui's Retirement Plan account would have generated from the total amount of contributions over the course of his employment with DHHS. See *Kuanysh Batyrbekov*, ARB No. 13-013, at 16.

Mr. Wilson's calculations as to the amounts Dr. Beltagui and DHHS would have contributed to the Retirement Plan are credible and reliable. See PX-2 at 1-3, 6-8. Therefore, in order to calculate the earnings, I find it is reasonable and appropriate to rely on the amounts that Mr. Wilson determined Dr. Beltagui and DHHS would each have contributed to the Retirement Plan. PX-2 at 6-8. Although the Retirement Plan handbook provides "Cash Balance participants are guaranteed a rate of return ('Interest Credit Rate') on their accounts" that is no less than 5%, it is unclear exactly how and when the 5% rate of return is applied to the Retirement Plan account balance, which is necessary to determine the earnings an account would generate. JX -7 at 11. As defined in the "State Employees Retirement Act," the Interest Credit Rate is "to be compounded annually." Neb. Rev. Stat. § 84-1301(18). Accordingly, I find the 5% guaranteed rate of return is compounded annually, which allows the earnings earned on the account balance in one year to be added back to the principal balance and is included in the total balance carried over from the previous year to calculate the earnings on the total account balance the following year at 5% after also adding the additional contributions in that year to the total balance.

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<sup>24</sup> \$5,123.03 + \$10,216.28 + \$12,720.00 = \$28,059.31. JX-2 at 145-147, 201-202; PX-2 at 8.

For purpose of clarity, I will calculate the earnings Dr. Beltagui's contributions would have generated separately from the earnings that DHHS' matching contributions would have generated.

i) Earnings on Dr. Beltagui's Contributions

Assuming Dr. Beltagui was entitled to the COLA increases in each year, my calculations with respect to the earnings on his required 4.8% contribution to the Retirement Plan are as follows:

In 2014, Dr. Beltagui would have contributed \$2,769.20<sup>25</sup> to the Retirement Plan. PX-2 at 6. After applying the annually compounded 5% rate of return to this amount, I find Dr. Beltagui's contributions would have generated \$138.46<sup>26</sup> in earnings in 2014. Dr. Beltagui's Retirement Plan account balance at the end of 2014 would have been \$2,907.66.<sup>27</sup>

In 2015, Dr. Beltagui would have contributed an additional \$14,191.24 to his Retirement Plan. PX-2 at 6-7. Accordingly, Dr. Beltagui would have a total account balance of \$17,098.90,<sup>28</sup> before calculating the earnings on his account. After applying the annually compounded 5% rate of return to this amount, I find Dr. Beltagui's contributions would have generated \$854.95<sup>29</sup> in earnings in 2015. Dr. Beltagui's Retirement Plan account balance at the end of 2015 would have been \$17,953.85.<sup>30</sup>

In 2016, Dr. Beltagui would have contributed an additional \$14,569.63 to his Retirement Plan. PX-2 at 6-7. Accordingly, Dr. Beltagui would have a total account balance of \$32,523.38, before calculating the earnings on his account. After applying the annually compounded 5% rate of return to this amount, I find Dr. Beltagui's contributions would have generated \$1,626.17 in earnings in 2016. Dr. Beltagui's Retirement Plan account balance at the end of 2016 would have been \$34,149.54.

Finally, in 2017, Dr. Beltagui would have contributed an additional \$9,095.12 to his Retirement Plan. PX-2 at 7-8. Accordingly, Dr. Beltagui would have a total account balance of \$43,244.466, before calculating the earnings on his account. After applying the annually compounded 5% rate of return to this amount, I find Dr. Beltagui's contributions would have generated \$2,162.23 in earnings in 2016. Dr. Beltagui's Retirement Plan account balance at the end of 2017 would have been \$45,406.90.

In total, I find Dr. Beltagui would have received \$4,780.71<sup>31</sup> in earnings from his contributions to the Retirement Plan account. As discussed above, DHHS paid Dr. Beltagui in

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<sup>25</sup> To calculate this sum, I added together each of the amounts Dr. Beltagui contributed in this calendar year, as provided in Column H of Mr. Wilson's spreadsheet. PX-2 at 6-8.

<sup>26</sup> \$2,769.20 (total balance from contributions) x 0.05 (rate of return) = \$138.46 (earnings).

<sup>27</sup> \$2,769.20 (balance from contributions) + \$138.46 (earnings) = \$2,907.66 (total balance at end of 2014).

<sup>28</sup> \$14,191.24 (total contributions in 2015) + \$2,907.66 (carry-over balance) = \$17,098.90 (balance before earnings).

<sup>29</sup> \$17,098.90 (total balance from contributions and 2014 balance) x 0.05 (rate of return) = \$854.95 (earnings).

<sup>30</sup> \$17,098.90 (total balance from before earnings) + \$854.85 (earnings) = \$17,953.85 (total balance at end of 2015).

<sup>31</sup> To calculate the total earnings his contributions would have generated, I added the earnings that would have been generated in each year from 2014-2017. (\$138.46 + \$854.95 + \$1,626.17 + \$2,162.23 = \$4,781.81).

the amount of \$1,770.62 for the earnings generated from his contributions to the Retirement Plan. After deducting this amount (\$1,770.78) from the total earnings Dr. Beltagui's contributions would have generated (\$4,781.81), I find Dr. Beltagui lost out on \$3,011.03 in total earnings through the end of 2017. 20 C.F.R. § 655.810(a).

Accordingly, I find DHHS owes Dr. Beltagui \$3,011.03 for the lost earnings that his contributions to the Retirement Plan would have generated, had he not been removed from plan participation by DHHS.

ii) Earnings on DHHS' Matching Contributions

As discussed above, Mr. Wilson's calculations as to the total amount DHHS would have made as matching contributions are accurate and reliable. In order to calculate the total earnings that would have been generated from DHHS' matching contributions, I will apply the same mathematical formula as I used to calculate the earnings on Dr. Beltagui's contributions.

With respect to the amount of earnings that DHHS' matching contributions would have generated, my calculations are summarized as follows:

In 2014, DHHS would have made matching contributions in the amount of \$4,319.95<sup>32</sup> to the Retirement Plan. PX-2 at 6. After applying the annually compounded 5% rate of return to this amount, I find DHHS' contributions would have generated \$216.00 in earnings in 2014. The balance of DHHS' matching contributions at the end of 2014 would have been \$4,535.95.

In 2015, DHHS would have made additional matching contributions in the amount of \$22,138.34 to the Retirement Plan. PX-2 at 6-7. Accordingly, the total matching contributions account balance would have been \$26,674.29, before calculating earnings. After applying the annually compounded 5% rate of return to this amount, I find DHHS' matching contributions would have generated \$1,333.71 in earnings in 2015. The balance of DHHS' matching contributions at the end of 2015 would have been \$28,008.00.

In 2016, DHHS would have made additional matching contributions in the amount of \$22,728.51. PX-2 at 6-7. Accordingly, the total matching contributions account balance would have been \$50,736.51 before calculating earnings. After applying the annually compounded 5% rate of return to this amount, I find DHHS' matching contributions would have generated \$2,536.83 in earnings in 2016. The balance of DHHS' matching contributions at the end of 2016 would have been \$53,273.34.

Finally, in 2017, DHHS would have made additional matching contributions in the amount of \$14,188.42. PX-2 at 7-8. Accordingly, the total matching contributions account balance would have been \$67,461.76, before calculating the earnings in 2017. After applying the annually compounded 5% rate of return to this amount, I find DHHS' matching contributions would have generated \$3,373.09 in earnings in 2017. The balance of DHHS' matching contributions plus the earnings generated on DHHS' matching contributions at the end of 2017 would have been \$70,834.85.

In total, I find Dr. Beltagui would have received \$7,459.63<sup>33</sup> in earnings from DHHS' matching contributions to the Retirement Plan account. Since DHHS did not refund Dr. Beltagui

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<sup>32</sup> To calculate this amount, I added together each of the amounts DHHS would have contributed in this calendar year, as provided in Column I of Mr. Wilson's spreadsheet. PX-2 at 6-8.

<sup>33</sup> To calculate the total earnings DHHS' contributions would have generated, I added the earnings that would have been generated in each year from 2014-2017. ( $\$216.00 + \$1,333.71 + \$2,536.83 + \$3,373.09 = \$7,459.63$ ).

any amount of its matching contributions, I find Dr. Beltagui is entitled to the full amount of earnings its matching contributions would have generated. 20 C.F.R. § 655.810(a).

Accordingly, I find DHHS owes Dr. Beltagui \$7,459.63 for the lost earnings that its matching contributions to the Retirement Plan would have generated, had he not been removed from plan participation by DHHS.

In total, I find DHHS owes Dr. Beltagui a total of \$10,470.66<sup>34</sup> for the lost earnings from the contributions made by both Dr. Beltagui and DHHS to Dr. Beltagui's Retirement Plan.

3. *Dr. Beltagui is not entitled to receive an award for the maximum amounts he claims he would have contributed to the Deferred Comp. Plan*

There is no dispute that Dr. Beltagui received a payment in the amount of \$20,416.48 from his Deferred Comp. Plan account, which is the amount he actually deferred to the Deferred Comp. Plan. JX-2 at 201, 202; JX-9 at 7-8.<sup>35</sup> Dr. Beltagui claims he is also entitled to an award for the amounts he would have contributed to the Deferred Comp. Plan. PP Br. at 19. Specifically, Dr. Beltagui argues that his exclusion from the Deferred Comp. Plan "resulted in [him] being unable to maximize his contributions during his employment." PP Br. at 19. Dr. Beltagui's position as to the amounts he claims he would have contributed and is entitled to receive are entirely speculative. Moreover the record evidence as to his past contributions to the Deferred Comp. Plan are more persuasive as to his expected participation in the Deferred Compensation Plan.

Dr. Beltagui testified that he did not maximize the amounts he could have contributed in 2014 or 2015. TR 37-38. He also testified he stopped contributing to the DCP "about halfway" through 2015. TR 36-37. The pay stubs in the record indicate that Dr. Beltagui voluntarily stopped making contributions to the Deferred Comp. Plan in the pay period with ending date of 10/18/2015. JX-2 at 218. Moreover, the pay stubs from the paycheck dated 1/06/2016 through the paycheck dated 9/14/2016,<sup>36</sup> indicate that Dr. Beltagui did not make any contributions to the Deferred Comp. Plan in 2016 at all. JX-2 at 206-215. Thus, Dr. Beltagui elected not to make any contributions to the Deferred Comp. Plan in the first half of 2016 prior to DHHS determining he was ineligible to participate.<sup>37</sup>

Dr. Beltagui also claims that his current contribution practices "provides insight into what [he] would have contributed to the Deferred Compensation Plan had DHHS not excluded him from participating." PP. Br. at 20. I find this assertion self-serving and unconvincing. The most

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<sup>34</sup> This amount is based on the sum of the \$3,011.03 for the lost earnings that his contributions would have generated, and the \$7,459.63 for the lost earnings that DHHS' matching contributions would have generated.

<sup>35</sup> As noted the Deferred Comp. Plan is entirely voluntary and employees can decide how much, up to the statutory limit, they will contribute each year. The Deferred Compensation Handbook explains that the annual limits "are adjusted each year for inflation" and they are "published in the January [Nebraska Public Employees Retirement Systems] newsletters and can be found on the DCP Enrollment and DCP Change forms." JX-8 at 8.

<sup>36</sup> DHHS ceased deducting the amounts Dr. Beltagui was contributing to the Retirement Plan in the very next pay period. JX-2 at 205-206.

<sup>37</sup> After a participant begins contributing to the Deferred Comp. Plan, they can then "change, stop, or re-start [their] contributions by completing a *DCP Plan Change* (NPERS Form 8400)." JX-8 at 7. Dr. Beltagui alleges he tried to re-enroll in the Deferred Comp. Plan again about halfway through 2016, but was denied re-entry back into the plan at that point. TR 36-38; PP Br. at 19. There is no evidence in the record that suggests Dr. Beltagui ever completed this form to re-start his contributions, which further undermines his claim.

persuasive evidence of Dr. Beltagui's contributions to the Deferred Comp. Plan are his actual contributions and the fact that he did not contribute consistently for the periods he was permitted to contribute to the Deferred Contribution Plan. Therefore, any claim as to what his contribution practices would have been in 2016 and 2017 is entirely speculative.

Based on the paycheck dated 12/23/16, Dr. Beltagui received a refund for his Deferred Comp. Plan contributions in the amount of \$5,833.28. JX-2 at 202. Similarly, based on the paycheck dated 12/29/2016, Dr. Beltagui received a repayment for his Deferred Comp. Plan contributions in the amount of \$14,883.20, with a total repayment for his contributions in the amount of \$20,416.48. JX-2 at 201. The parties stipulate this is the full amount of his contributions to the Deferred Comp. Plan. JX-9 at 7-8. Therefore, I find Dr. Beltagui received the full amount of his contributions to the Deferred Comp. Plan.

Accordingly, I find Dr. Beltagui is not entitled to an additional award to compensate him for the maximum amount of contributions he could have made.

Dr. Beltagui also claims he is entitled to receive the earnings that his contributions to the Deferred Comp. Plan would have generated. PP Br. at 21. I find there is not sufficient evidence to make the requisite calculations to determine the amount of earnings Dr. Beltagui's contributions would have generated. Participants in the Deferred Comp. Plan "must make their own investment decisions" and there is no guaranteed rate of return. JX-8 at 11. Additionally, there are 13 investment options, and the options may change "from time to time." JX-8 at 12. There is no evidence as to what investment option Dr. Beltagui selected. In fact, Mr. Wilson made speculative calculations as to the amount of earnings Dr. Beltagui's Deferred Comp. Plan account would have generated because he "did not have the actual fund mix of where they were contributed." TR 74-75; PX-2 at 8. As a result, I find Dr. Beltagui has not provided sufficient to make the requisite calculations to determine the lost earnings on his Deferred Comp. Plan account. *See Kuanysh Batyrbekov*, ARB No. 13-013, at 16.

*4. Dr. Beltagui is entitled to receive an award for lost tax benefits associated with the Retirement Plan and the Deferred Comp. Plan refunds*

Dr. Beltagui argues he is entitled to receive an award for the lost tax deferral advantages associated with the contributions that were made, and those that should have been made, to the Retirement Plan by him and DHHS, as well as the lost tax advantages associated with his contributions to the Deferred Comp. Plan. PP Br. at 2. DHHS argues that it is not responsible for restoring any tax deferral advantages. Resp. Br. at 23-24. For the reasons below, I find Dr. Beltagui is entitled to receive an award for restoring the tax advantages Dr. Beltagui would have realized if he had not been excluded from participation in the Retirement Plan and Deferred Comp. Plan.

Similar to the earnings Dr. Beltagui would have realized from the contributions to the Retirement Plan, I find the tax consequences and benefits associated with these plans are components of the fringe benefits that were not offered to Dr. Beltagui. Therefore, I find DHHS failed to offer Dr. Beltagui the same fringe benefits on the same basis as it offered to its U.S. workers. 20 C.F.R. § 655.731(c)(3). The amount Dr. Beltagui is entitled to receive is limited to the difference between what he would have received and what he actually received. 20 C.F.R. § 655.810(a).

The amount Dr. Beltagui claims he is entitled to receive for lost tax advantages is based on Mr. Wilson's calculations. PP Br. at 18. Mr. Wilson testified that during the years in question, Dr. Beltagui was in the 33% federal tax bracket and the 7.88% Nebraska tax bracket.

TR 81. He also testified that the highest marginal tax rate in the State of Nebraska for the year 2017 was 6.84%. TR 91. Despite this conflicting information, Mr. Wilson used the 7.88% tax bracket to calculate the tax consequences for each of the awards. TR 91; PX-2 at 4, 6-8. Dr. Beltagui has not provided any additional evidence to clarify which State of Nebraska tax bracket he was in for the years in question. Therefore, I find there is insufficient evidence to calculate Dr. Beltagui's lost tax advantages as a taxpayer of the State of Nebraska. Consequently, I find Mr. Wilson's calculations as to the total lost tax benefits realized by Dr. Beltagui are inaccurate and unreliable.

Nevertheless, I find there is sufficient evidence to make the requisite calculations for certain lost U.S. federal tax advantages. *Kuanysh Batyrbekov*, ARB No. 13-013, at 16. Specifically, there is no dispute that Dr. Beltagui's earnings placed him in the 33% federal tax bracket in the years in question. Therefore, I find the 33% federal tax rate is an accurate figure to use in calculating federal income tax advantages and losses. Additionally, Mr. Wilson's calculations are accurate with respect to the amounts Dr. Beltagui contributed to the Retirement Plan. Therefore, I find there is sufficient evidence to calculate the lost tax advantages related to his actual contributions to the Retirement Plan and Deferred Comp. Plan.

A. Dr. Beltagui is entitled to an award for the taxes incurred for the total amounts refunded to him in 2016 for his contributions to the Retirement Plan and Deferred Comp. Plan

In 2016, Dr. Beltagui received as income a total refund in the amount of \$48,475.79<sup>38</sup> from DHHS for his contributions to the Retirement Plan and Deferred Comp. Plan.<sup>39</sup> JX-2 at 145-147, 201-202; JX-9 at 7-8. Since this amount was paid to Dr. Beltagui as income, he was required to pay an increased tax in 2016. Based on the 33% federal tax bracket, I find Dr. Beltagui would have been taxed an additional \$15,997.01<sup>40</sup> for the amounts he was refunded in 2016. Accordingly, because Dr. Beltagui would not have had to pay this increased tax amount if he was not improperly excluded from participating in the Retirement Plan and Deferred Comp. Plan by DHHS, I find Dr. Beltagui is entitled to recoup the full amount he was taxed.

Accordingly, I find DHHS owes Dr. Beltagui an amount of \$15,997.01 for the lost tax deferral advantage on the total amount of contributions he made to the Retirement Plan and the Deferred Comp. Plan. 20 C.F.R. § 655.810(a).

B. Dr. Beltagui is entitled to an award for the lost tax advantages of deferring contributions to the Retirement Plan

Dr. Beltagui received as income the amounts he would have been required to contribute to the Retirement Plan beginning on pay period ending 09/04/2016, through the end of his employment. *See* JX-2 at 206-223. Assuming Dr. Beltagui had been allowed to continue contributing to the Retirement Plan at 4.8% of his gross wages, which took into account the COLA increases he would have received, through the end of his employment with DHHS, Dr.

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<sup>38</sup> \$28,059.31 (Retirement Plan refund) + \$20,416.48 (Deferred Comp. Plan refund) = \$48,475.79 (total refund).

<sup>39</sup> Because I have determined Dr. Beltagui failed to meet his burden of establishing entitlement to the additional amounts he could have contributed to the Deferred Comp. Plan and the respective earnings from those contributions, I need not address the argument he is entitled to receive the lost tax advantages related to such contributions and earnings. PP Br. at 18-19.

<sup>40</sup> \$48,475.79 (total refund) x 0.33 (tax rate) = \$15,997.01.

Beltagui would have made an additional \$14,336.56<sup>41</sup> in tax deferred contributions. *See* PX-2 at 7-8. Based on the 33% federal tax bracket, I find Dr. Beltagui was required to pay an additional \$4,731.06<sup>42</sup> in taxes on the amounts he would have been required to contribute to the Retirement Plan. Since Dr. Beltagui would not have had to pay this increased tax amount if he was not improperly excluded from participating in the Retirement Plan, I find Dr. Beltagui is entitled to recoup the full amount he was taxed.

Accordingly, I find DHHS owes Dr. Beltagui an amount of \$4,731.06 for the lost tax deferral advantages from the amounts he would have contributed to the Retirement Plan. 20 C.F.R. § 655.810(a).

C. Dr. Beltagui is not entitled to receive an award for the lost tax deferral advantages of the matching contributions and the earnings paid outside of the retirement plan

Dr. Beltagui claims he is entitled to an award for the tax consequences of receiving the award for DHHS' matching contributions, and on the awards for the earnings on his contributions and DHHS' contributions that are being paid to Dr. Beltagui outside of the Retirement Plan. PP Br. at 17-19. This claim is entirely speculative. The award for the matching contributions and the earnings on the contributions has not yet been paid out to Dr. Beltagui by DHHS. Because the amounts have not yet been paid by DHHS, the amount of any increased tax that will result from the receipt of these matching contributions and earnings is not yet known.<sup>43</sup> Accordingly, I find Dr. Beltagui has failed to provide a basis to award him an amount for the increased tax burden that may result from the payment of matching contributions and the earnings outside of the Retirement Plan. *See Huang v. Administrative Review Board, USDOL*, 579 Fed. Appx. 228, slip op. at 8-9 (5th Cir. Aug. 12, 2014) (per curiam) (unpublished) (case below ARB No. 09-044, 09-056, ALJ No. 2008-LCA-11).<sup>44</sup>

**D. Dr. Beltagui is not entitled to an award for attorneys' fees**

The regulations do not explicitly provide for the award of attorneys' fees in LCA cases.<sup>45</sup> As noted, the remedy for an employer's failure to pay wages or provide fringe benefits as required is for the payment of the wages and fringe benefits owed. Such wages and fringe benefits shall be equal to the difference between the amount that should have been paid and the amount that was actually paid to the nonimmigrant. 20 C.F.R. 655.810(a). Dr. Beltagui asserts

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<sup>41</sup> This amount reflects the total contributions from the pay period in which he was excluded from participating in the Retirement Plan (9/4/2016) through the end of his employment with DHHS on July 31, 2017.

<sup>42</sup> \$14,336.56 (additional contributions) x 0.33 (tax rate) = \$4,731.06.

<sup>43</sup> I note the recent tax law modified the individual tax brackets. *See* 26 U.S.C. § 1(a) (effective Dec. 22, 2017).

<sup>44</sup> In *Huang*, the Fifth circuit affirmed the district court's decision to deny the request to order the ARB and ALJ to award damages for a possible increase in taxes because the claim was "purely speculative," since the employer did not yet pay out the lump sum of damages, and there was a lack of evidence to support the claim. *See Huang*, 579 Fed. Appx. 228, slip op. at 8-9 (5th Cir. Aug. 12, 2014) (per curiam) (unpublished) (case below *Huang v. Administrative Review Board, USDOL*, No. 12-cv-35, slip op. at 12 (S.D.Tx. Aug. 8, 2013) ARB No. 09-044, 09-056, ALJ No. 2008-LCA-11)).

<sup>45</sup> Except for an award related to the costs connected to the "performance of H-1B program functions which are required to be performed by the employer . . . ." 20 C.F.R. § 655.731(c)(9)(iii)(C). As Dr. Beltagui points out, the ARB has upheld the award of attorneys' fees in LCA cases. PP Br. at 27. However, in the cases Dr. Beltagui cites, the award of attorneys' fees was upheld by the ARB because the awards were based on the amounts that the costs incurred by the H-1B nonimmigrant related to the preparation and filing of the LCA and H-1B petition. *See Limanseto v. Ganze & Co.*, ARB No. 11-068, ALJ No. 2011-LCA-005, at 5, 8 (ARB Jun. 6, 2013); *Wage and Hour Div. v. Lung Assocs., P.A.*, ARB No. 09-029, ALJ No. 2007-LCA-013, at 10 (ARB Mar. 24, 2011). There is no issue in this case related to the preparation and filing of the LCA or the H-1B petition.

this regulation provides for “further administrative and equitable relief.” PP Br. at 27. Presumably, Dr. Beltagui is referring to Section 655.810(f). It is not necessary for me to determine whether Section 655.810(f) permits an award of attorney fee because Dr. Beltagui has presented no evidence upon which I could make an award of attorney fees.<sup>46</sup> Any award would be based upon supposition and speculation. Therefore, I find Dr. Beltagui is not entitled to an award for attorneys’ fees in this matter.

Accordingly, I find Dr. Beltagui is not entitled to an award for attorneys’ fees.

## **VII. CONCLUSION**

After careful consideration of the parties stipulations, the evidence offered and testimony I conclude DHHS violated the Act and regulations and owes Dr. Beltagui back wages and fringe benefits as follows:

1. Back wages in the amount of \$23,421.83 for failing to pay COLA increases for 2015-2017;
2. DHHS matching contributions to the Retirement Plan in the amount of \$63,375.22;
3. A sum of \$10,470.66 representing lost earnings from both Dr. Beltagui’s and DHHS contributions to his Retirement Plan;
4. Lost tax advantage in the amount of \$15,997.01 for federal income taxes paid in 2016 for amounts refunded Dr. Beltagui from both his Retirement Plan and Deferred Comp. Plan Accounts;
5. Lost tax advantage in the amount of \$4,731.06 for federal income taxes paid on amounts Dr. Beltagui would otherwise have deferred from his income to the Retirement Plan.

Therefore, Dr. Beltagui is entitled to a total of \$117,995.78 in wages and fringe benefits as a result of DHHS’s violation of the Act and regulations covering H-1B program.

### **ORDER**

DHHS is directed to pay Dr. Beltagui \$113,264.72 in back wages and fringe benefits improperly withheld.

**SO ORDERED.**

**COLLEEN A. GERAGHTY**  
Administrative Law Judge

Boston, Massachusetts

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<sup>46</sup> He did not provide his hourly rate, the number of hours expended, etc. See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

**NOTICE OF APPEAL RIGHTS:** Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition only one copy need be uploaded.

If no petition for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. *See* 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board's receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.