U.S. Department of Labor

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Issue Date: 02 August 2005

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In the Matter of

ADMINISTRATOR, WAGE & HOUR DIVISION, EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEPARTMENT OF LABOR
Prosecuting Party
v.
FAMILY HEALTH CENTER OF COLUMBIA COUNTY, INC.
Respondent

Case No. 2005 LCA 00001

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Before: Stuart A. Levin
Administrative Law Judge

For Complainant:
Robert J. Jacobs, Esq.
Gainesville, Florida

For Administrator:
Gwen Y. Anderson, Esq.
Office of the Solicitor,
Atlanta, GA.

Decision and Order

This matter arises pursuant to a complaint filed by the Family Health Center of Columbia County, Florida, (hereinafter, FHC or the Center), challenging a determination by a U.S. Department of Labor (DOL) Wage and Hour Division Administrator that it violated the Immigration and Nationality Act as amended, (INA) 8 U.S.C. § 1182(n)(2) and 20 C.F.R §§ 655.731 and 655.805(a)(2). The

Administrator accused FHC of failing, under the H-1B visa program, to specify the accurate wage rate on a labor condition application (LCA) seeking to employ Dr. Rohit Suri as a nonimmigrant primary care physician and failing to pay the attorney and filing fees associated with the physician's employment. The Administrator determined that the Center owed the doctor back wages in the amount of $34,930.30, including cost reimbursements, and further assessed a civil penalty in the amount of $1,000.00. 20 C.F.R.§ 655.810. Disputing these charges, FHC requested a hearing.

The H-1B Visa Program

By way of background, the H-1B visa program, authorized under the INA, is a voluntary program that permits employers temporarily to employ non-immigrants to fill specialized jobs in the United States. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b) (West 1999). An employer seeking to hire an alien on an H-1B visa must first obtain certification by filing with DOL an LCA specifying the number of aliens sought, the occupational classification, the required wage rate, prevailing wage data, the source of the wage data, the date of need, and the period of employment. 20 C.F.R. § 655.730(a); § 655.731. Primarily to protect the wages and working conditions of U.S. workers, the employer must, at a minimum, pay the H-1B worker the higher of its actual wage rate or the locally prevailing wage for the occupation. 8 U.S.C.A. §1182(n)(1)(A); 20 C.F.R. §655.731(a). To assist employers seeking the services of a foreign workers in H-1B status, DOL has published detailed guidance to help employers determine and document the minimum wage rate the workers may be paid.

To ascertain the "required wage rate," the employer must determine both the "actual wage" and the "prevailing wage" for the occupation in the geographic labor market in which the alien is to be employed. 20 C.F.R. § 655.731. The "actual wage" is the wage rate the employer pays to all other individuals with similar experience and qualifications for the specific employment in question. . 20 C.F.R. §655.731(a)(1). The "prevailing wage" is the wage rate for the occupational classification in the area of intended employment at the time the LCA is filed. 20 C.F.R. §655.731(a)(2). The employer may obtain prevailing wage information from any of a variety of sources such as the state employment security agency ("SESA"), an independent authoritative source, or some other legitimate source. *Id*. The "wage rate" is the compensation an H-1B employee will be paid stated in terms of amount per hour, day, month or year. 20 C.F.R. § 655.715.

Complainant FHC

The FHC is a federally funded primary health care facility located in Lake City, Florida. John T. Myles is its Chief Executive Officer. Tr. 53. Its primary mission is to provide healthcare to uninsured and underinsured individuals in a medically underserved area of Florida. To accomplish its mission, the Center employs international medical graduates (IMGs) who usually enter the U.S. on J-1 visas to pursue their graduate medical training, then, rather than return home for the two-year period otherwise required by the J-1 visa, they seek to extend their stay by agreeing to work for three years in a medically underserved area of the U.S. Tr. 194-5.

The Nonimmigrant IMG

Dr. Rohit Suri graduated from the Government Medical College in Jammu, India. Tr. 206. The system for educating physicians in India is somewhat different from the system in place in the U.S. Unlike a medical school applicant in the U.S., a basic college education is not a requirement to attend medical school in India. Tr. 169, 207. After high school, and two years of post-secondary education, those who pass a national examination, can go to medical school. Tr. 207. Thus, having completed his training in India, Dr. Suri arrived in the U.S. under a J-1 visa to further his graduate medical education. Tr. 191-92.

Following a residency at the University of Illinois, Chicago, Dr. Suri passed his U.S. Medical Licenses Admission Boards and eventually became Board Certified in Family Practice. Tr. 171-72. Hoping to remain in the U.S., Dr. Suri had retained an attorney and was seeking a waiver of the two-year home residency requirements of his J-1 visa.[1] Eventually, he found a position with FHC, and his attorney continued to assist in the process of filing the LCA. Dr. Suri paid the attorney $4905.00 in filing fees and attorney's fees. The Administrator demands that FHC reimburse Dr. Suri for these expenditures

In August, 2002, Dr. Suri commenced his employment at FHC in H-1B status under a waiver program known as the Conrad State 30 program which allows states to sponsor up to 30 residency waivers mainly for J-1 doctors to work in medically underserved areas. The FHC had filed an LCA, which J-1 visas do

[1] IMG's with J-1 visas who complete a year or more of graduate medical education and pass all three steps of the USMLE may change their status from J-1 to H-1B by showing they will be working for three years in a medically "underserved area." Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Section 214(1)(2)(A).

not require, to employ Dr. Suri, and it designated him as a Level I physician at an annual pay rate of $104,000. The LCA further indicated that the prevailing wage was $93,101.00. After 18 months, he left the Center and filed a complaint with DOL alleging that FHC failed to pay him the prevailing wage for his work.

After receiving the complaint, the DOL's Wage & Hour Division investigated Dr. Suri's position and determined that he performed the work of a Level II, or fully competent, experienced, physician who received only technical guidance. As such, it concluded he should have been paid the prevailing wage for job duties performed by a Level II physician, and, in Columbia County, Florida, that amounted to an annual pay rate of $121,555.20. The Administrator thus notified FHC that its failure to pay the applicable prevailing wage to its nonimmigrant alien employee violated the H-1B regulations, and further instructed the Center to pay Dr. Suri $30,025.30 in back wages.[2] *See* 20 C.F.R. § 655.731.

Classifying Dr. Suri

The record shows that FHC used the Occupational Employment Statistics Survey (OES) to determine the prevailing wage for the position it sought to fill. (GX1). In October, 1997, DOL issued General Administration Letter (GAL) 2-98 to State Employment Security Agencies requiring them to look to the Bureau of Labor Statistics OES in determining prevailing wages. The OES survey, in turn, produces wage data for two occupational skill levels; Level I and Level II. Guidance published by ETA differentiates the skill levels as follows:

> Level I- Beginning level employees who have a basic understanding of the occupation through education or experience. They perform routine or moderately complex tasks that require limited exercise of judgment and provide and provide experience and familiarization with the employer's methods, practices and programs. They may assist staff performing tasks requiring skills equivalent to a Level II and may perform higher level

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[2] The record shows that the prevailing wage for a Level II physician in Columbia County, Florida is $121,555.20 or $4,675.20, bi-weekly. Tr. 119-129; GX 12. Dr. Suri was paid $104,000.00 or $4,000.00, bi-weekly; $675.20 less than the Level II prevailing wage. GX 1; GX 10. In the first pay period, Dr. Suri worked 56 hours and was paid $2,800.00. The Level II prevailing wage for the same number of hours worked is $3,272.64. The second pay period, he worked 61 hours and received $3,075.00. The Level II prevailing wage for the same number of hours worked is $3,594.06. Thus, for the first two pay periods, difference between Dr. Suri's actual pay and the pay for a Level II physician is $991.70. GX 1; GX 10. For the remaining 43 pay periods, from September 25, 2002, to May 5, 2004, the difference between Dr. Suri's actual pay and the pay for a Level II physician is $29,033.60. (43x $675.20). GX 10. Consequently, in total, Dr. Suri was paid $30,025.30 less than the prevailing wage for a Level II physician.

> work for training and development purposes. These employees work under close supervision and receive specific instruction on tasks and results expected. Work is closely monitored and reviewed for accuracy.
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> Level II- Fully competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees used advanced skills and diversified knowledge to solve unusual problems. They may supervise or provide direction to staff performing tasks requiring skill equivalent to a Level I. These employees receive only technical guidance and their work is reviewed for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. GAL 2-98; see, (GX 7, 8, CX –C).

Thus, an employer must consider such factors as the complexity of the job duties, the amount of supervision, and the level of judgment a job entails. (CX C; GX 8). Ordinarily, a position such as a physician, requiring a license, would warrant a Level II, but the Employer may establish that the position does not actually involve all of the duties of the occupation, (CX C; GX 8), or imposes close supervision, involves only moderately complex duties, or allows only limited exercise of independent judgment. *See,* Guidance Letter (GL) 5-02 (CX C). By way of illustration, the GL 5-02, provides the example of a first year licensed psychologist in a group practice who is assigned to work along side or is closely supervised by a senior psychologist. Although the job requires a licensed practitioner, GL 5-02 suggests that the psychologist who occupied the supervised position "could be considered Level 1."

FHC considered its past hiring practices and contends it classified Dr. Suri as a Level I physician for good and sufficient reasons. It notes that the OES contains data for both Level I and Level II physicians, and, therefore, the skill levels of a doctor can not automatically be assumed to rate a Level II classification. Indeed, GL 5-02 provides that every occupation has Level I and Level II proficiencies. Further, under 20 C.F.R. §655.731(a)(2)(iii)(A)(3), DOL accepts the prevailing wage determination of the SESA's, and in the past, DOL has certified LCA's for primary health care physicians at the Level I position. Tr. 70-71.

As an IMG in the Conrad State 30 program, Dr. Suri's position as a primary healthcare provider was, the Center argues, his first professional job in the U.S., and, as consequence, it was an entry level position for him. FHC also adduced survey data from the Coordinator of the Florida Conrad 30 Program showing that for the period September, 2000, to September, 2004, ninety-three IMG physicians were classified as Level I, and 4 IMG physicians, all cardiologists, received Level II wages. (CX F, D). These data, FHC believes, demonstrate that DOL has consistently recognized Conrad 30 physicians as entry level doctors who warrant a Level I wage.

Responding further, FHC offered the affidavit of Daniel Romans, a Prevailing Wage Specialist at the Florida Workforce Program. Mr. Romans is responsible for determining prevailing wages for H-1B, LCA's. (CX 3). He explained that a prevailing wage determination is based on the position, the nature of the job duties, the job requirements, and the location of employment. In his opinion, based on the job description and location, FHC correctly classified Dr. Suri as a Level I physician. Mr. Romans explained that all occupation including those that require professional licensing have two levels. Consequently, he reasoned that a licensed physician without prior experience is, by law, able to examine patients and prescribe medication without supervision from another doctor: "Thus a position for a Primary Care Physician that requires no prior experience is an entry level position within its category and thus a level one position." (CX A). FHC notes further that, considering Mr. Romans' position with the Florida Workforce program, his determination of the prevailing wage would have been conclusive in this matter had it been obtained before FHC submitted its LCA. 20 C.F.R. §655.731(a)(2)(iii)(A)(3).

Finally, in confirmation of the wage it paid Dr. Suri, FHC adduced another survey which showed that in 2004, with the exception of seven Florida counties in which both Level I and Level II earned at least $70.00+ per hour, the wages for entry level family practitioners, whether IMG's or graduates of a U.S. medical school, employed by federally qualified Community Health Centers throughout Florida, had starting salaries below Level II, (CX D), and that even Dr. Suri, who left FHC for another Conrad 30 position at the Community Health Center in Pinellas County, Florida, is currently paid less than a Level II wage.

Dr. Suri's Duties at FHC

The record shows that Dr. Suri was hired by FHC to perform the duties of a primary care doctor, GX 3, 4, diagnosing and treating patients with medical conditions ranging from common colds to cancer, Tr. 173-81; patients who, at times, presented with symptoms that required immediate and comprehensive treatment. Tr. 77; GX 3. Dr. Suri performed minor surgery, and treated pediatric, gynecological and obstetrics patients. Tr. 174. At times, he worked as the only physician on duty at the Center, and the record is devoid of evidence that, in other than purely administrative matters, such as time and attendance oversight, he was ever professionally supervised in respect to the care he provided, the medicines he prescribed, or the treatment he administered to any of the Center's patients. Dr. Suri was Board Certified in Family Practice, and no physician or clinic official testified in this proceeding that he needed or was required by FHC to seek professional supervision of any sort.

Discussion

I.

FHC argues initially that the Administrator applied an improper standard in determining that it paid Dr. Suri less than the prevailing wage. It notes that the Administrator referred to Dr. Suri's experience and qualifications in deciding that he should be paid at the Level II rate, and this "misstates" the prevailing wage requirements which focus on the job duties and responsibilities not the employee's experience and qualifications. *See,* GAL 2-98; GL 5-02. In addition, FHC emphasizes that it has, in the past, received two LCA certifications from ETA for entry level primary care physicians at the Level 1 prevailing wage rate, and the wages were never challenged. Citing the policies which underlie the Conrad State 30 program, FHC contends that Level 1 wages are adequate because the IMG is "rewarded" for his contribution to the medically underserved "by a waiver of the home residency requirement" of his J-1 visa. Compl Br. at pg. 9. Thus, the data show that for the period September, 2000, to September, 2004, ninety-seven Conrad 30 physicians served in Florida and only 4, all cardiologists, received Level II wages, the rest received Level I pay. Consequently, FHC argues that the charge that it failed to pay the prevailing wage in violation of Sections 655.731 and 655.805(a)(2) and should be dismissed.[3]

[3] FHC correctly notes that the Administrator argued that first year medical residents are closely supervised and would be classified as level 1 in contrast with second year medical residents who work with less supervision and might be classified as Level II. *See*, Admin Br. at 8-9, citing GL 5-02. To the extent the Administrator's argument,

II.

FHC correctly asserts that job duties and responsibilities, and not experience and qualifications, determine the prevailing wage requirements of a job, and there is no dispute that it filled its position with an entry level primary care Conrad 30 physician. Nor is it disputed that under the Florida Workforce Program an entry level primary care Conrad 30 physician would be designated Level 1. Mr. Romans has made that clear. Nevertheless, while the regulations are deferential to State Workforce Program prevailing wage determinations, the rationale employed to classify entry level primary care physicians as Level 1 is not entirely consistent with ETA's guidance in these situations.

Thus, Mr. Romans, Florida's Conrad 30 prevailing wage specialist, explained that all occupations have two levels, and all licensed physicians are, by law, able to examine patients and prescribe medication without supervision. He reasoned further that a primary care position that requires no prior experience "is entry level, and thus a level one position," and, from past practice, it seems Florida Workforce routinely classified entry level positions for licensed H-1B professionals as Level 1. ETA, however, has adopted a different analytical approach.

III.
ETA Guidance

ETA explained in GL 5-02 that, under circumstances in which a professional license is required to perform the duties of the occupation, those who hold the license are, in essence, presumptively Level II, unless the employer shows that the position does not require all of the duties of the occupation or the employer does not afford the practitioner the professional independence its non-entry level professionals exercise. Indeed, ETA illustrated this distinction using the example of a licensed psychologist.

A newly licensed psychologist is free, by law, to exercise all of the privileges of the profession. Consequently, if he or she opens a practice or joins a practice that allows the new entrant the freedom to practice independently without

in context, implies, as FHC suggests, that Dr. Suri's position should be considered a Level II because a second year resident could be a Level II, the argument is misguided because physician's have two OES levels distinct from medical residents.

professional restraint, the position occupied is Level II. In contrast, ETA distinguishes this practitioner from the entry level licensed professional who joins a practice that imposes professional limits on the new associate's freedom of practice without the close supervision of a senior colleague. Indeed, in apparent recognition that all licensed professionals from time to time consult with their colleagues, ETA has differentiated, for prevailing wage classification purposes, Level II practitioners whose jobs allow them freely and independently to exercise the privileges of their license from Level I practitioners whose jobs impose close supervisory oversight before they may exercise the privileges of their license.

IV.
Past Practice

FHC argues further, however, that, historically, Conrad State 30 entry level primary care physicians at its clinic, and throughout the State of Florida, have been classified as Level 1 positions, and Community Health Centers wage survey data shows that "all" entry level primary care physicians, both IMG's and U.S. medical school graduates, in Florida earn less than Level II. Yet, neither the Community Health survey data nor the historical classification of Conrad 30 physicians in Florida supports FHC's classification of Dr. Suri.

Initially it must be noted that the wage data reveals no wage distinction between entry-level and non-entry level primary care physicians in seven Florida counties in which both classifications are shown at $70.00+ per hour. Beyond that, however, the survey data generally fail to distinguish the primary care physicians who practice essentially without supervision from those subject to professional limitations or close supervision imposed by their employers. Thus, the data permit one to conclude that the prevailing wages of entry level primary care physicians in many instances are below Level II wages, but this does not indicate that the earnings of many entry level physicians in the prevailing wage survey were not equal to or even higher than the prevailing wages of Level II physicians. Further, while the data imply that some entry level physicians may earn less than the prevailing wage in any given county and some may earn more, it tells us nothing about the level of supervision or freedom of practice enjoyed by any entry level physician in the survey regardless of the wage he or she receives. Accordingly, the data are not sufficiently refined to permit the sort of job classification analysis ETA requires.

FHC argues further, however, that since September of 2000, all but four of the Conrad 30 primary care physicians employed in Florida have been classified as

Level I, and the four at Level II were cardiologists. While past practice may be relevant, in this instance it is not entirely persuasive. The record does not show whether, or how many, past instances of certification were based on Florida Workforce Program determinations of prevailing wages obtained before submission of the LCA. 20 C.F.R. §655.731(a)(2)(iii)(A)(3). These determinations may have been conclusive under the particular circumstances in which they were issued, but, as previously discussed, the rationale the Florida Workforce Program used to classify all entry level Conrad 30 physicians at Level I does not adequately address the guidelines ETA has established. Further, since the record does not show the degree of supervision imposed in the past or the freedom of practice enjoyed by any of the Conrad 30 physicians previously employed at any particular Community Health Center, including FHC, past practice does not guide us to the correct outcome here.

V.
Dr. Suri's Freedom of Practice

In this proceeding, FHC failed to demonstrate that it exercised any supervision over Dr. Suri's medical decisions, diagnoses, treatment, or prescriptions. No senior colleague or clinic official testified that Dr. Suri, even at his entry level, was in any way limited by Center policy or practice from the full exercise of the privileges of his medical license. There is no evidence that he was required to seek approval or even consult with anyone else before administering the medical treatment he deemed appropriate for any of the clinics patients. He was Board Certified in Family Practice, and at times he worked alone. He may have been employed in his first job as a physician in the U.S., and was entry level, but FHC employed him to perform his duties as a primary care physician consistent with the full exercise of the privileges of his license without limitation or supervision. Thus, the Administrator correctly concluded that the FHC job actually entailed Level II skills, duties, independent performance, and responsibilities, and FHC, thus, improperly designated the job as Level I position. Applying ETA guidelines under these circumstances, the job duties and responsibilities FHC established for Dr. Suri rendered him a Level II physician[4] who is owed the back wages determined by the Administrator.[5]

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[4] FHC notes that Dr. Suri has left FHC and has taken another Conrad 30 job at less than a Level II pay. Again, however, the duties, responsibilities, limitations, and supervision his current position might entail are not revealed in this record, and, accordingly, the propriety of his current pay level can not be evaluated.

[5] FHC suggested that any back pay award was unnecessary because Dr. Suri was sufficiently "rewarded" by the waiver of the home residency requirements of his J-1 visa. While it is not disputed that IMG's provide needed services in underserved areas, as FHC suggests, the reward for the IMG, who works in medically underserved communities in this country under the H-1B program and may eventually secure permanent U.S. residence or

Attorney and Filing Fees

The Administrator charged FHC with a violation of Section 655.731(c)(10)(ii), because Dr. Suri paid a $1,000.00 filing fee which FHC acknowledges it should have paid. At hearing, FHC agreed to reimburse Dr. Suri, Tr. 50, and, accordingly, we shall discuss below whether this violation warrants a civil penalty, but it is unnecessary to dwell further on the merits of this charge.

The Administrator also charged FHC with a violation of Section 655.731 (c)(10)(ii) and 655.805(a)(11) for passing along to Dr. Suri an attorney fee in the amount of $3905.00. Complainant acknowledges that this charge "could have been raised under Section 655.731(c)(9)(iii)" which specifically designates an attorney fee paid for obtaining the H-1B visa as an employer business expense, and, therefore, an unauthorized deduction from the Employee's wages; however, the Administrator's incorrect citation to the regulation in the charging paragraph of the Determination Letter, according to Complainant, warrants dismissal of this charge. Rep Br. at 17.

Motion to Amend

While the Administrator acknowledges that Section 655.731 (c)(10)(ii) or 655.731 (c)(12) were not specifically cited in the determination letter, he did advise Complainant that the violation included the "additional fees and costs connected with the filing of an LCA and an I-129 petition," and he did notify FHC that it would be assessed for this reimbursement, "even if the worker had paid the money to a third party." GX 6. At hearing, the parties addressed the fees and costs referenced in the determination letter, and fully litigated Dr. Suri's payment of $3905.00 to the attorney who assisted in obtaining the H-1B visa. In view of the evidence adduced, the Administrator moved to conform the determination letter to the evidence, (Tr. 244) and Complainant objected, alleging surprise and prejudice. Tr. 237-38. In view of its contentions, Complainant was afforded a full opportunity to specify in its post-hearing briefs how, in light of issues raised and litigated at the hearing, GX 3; GX 17;Tr.76, 87-89, 184-87; 203-205, it was

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citizenship, is incalculable. Thus, the prevailing wage requirements and back pay remedies associated with the H-1B program, and many other alien worker programs, are not crafted solely to protect foreign workers from exploitation, but to protect the U.S. workforce. Indeed, the benefits that may accrue to an IMG who remains in this country in the long term may be more than sufficient to justify a short term wage sacrifice during the three-year H-1B service period. Absent a prevailing wage requirement, Conrad 30 IMG's would likely bid down the wages of primary care physicians in medically underserved areas to the detriment of U.S trained physicians and would likely make it even more difficult for underserved areas to attract U.S. trained physicians.

prejudiced by the incorrect citation to regulation in the determination letter. Tr. 242-44.

Although Complainant's Brief and Complainant's Reply Brief addressed this issue, neither submission explained how FHC would be prejudiced by an amendment to the charging document. Instead, Complainant reiterated its contention that an amendment would deprive it of due process due to lack of notice, but it failed to specify what steps it would have taken or evidence it would have, but could not, adduce due to the incorrect citation to the regulations in the determination letter. Indeed, in its Reply Brief, Complainant argued that Federal Rule 15(b) would not be applicable because "the issue of attorney's fees **was** raised at the hearing," (Reply Br. at 2, emphasis in original), and the denial of the motion to amend "precluded this issue from being tried by express or implied consent." Rep Br. at 2.

Yet, Complainant's argument is mistaken in two respects. First, the Motion to Amend was interposed at the end of the hearing after the issue of attorney's fees had been addressed by the parties. Tr. 62-64, 88-89, 76, 87-89, 120-21, 149-50, 184-87; 203-205, GX 3; GX 17. Consequently, Complainant was not effectively precluded from litigating this issue of attorney's fees, it actually did litigate this issue. The Motion to Amend was thus taken under advisement at the end of the hearing after closing arguments to grant Complainant time adequately to support, in its post-hearing brief, the unsubstantiated assertion of prejudice it raised at the hearing. Second, the applicable rule is not Federal Rule 15(b), but 29 C.F.R. §18.5(e) which provides that appropriate amendments may be allowed under "such circumstances as are necessary to avoid prejudicing the public interest and the rights of the parties." Since Complainant did litigate the issue, notwithstanding its claim of prejudice by lack of notice, FHC was afforded a full opportunity to explain how its rights would prejudiced if the motion were granted over its objection that the amendment would deprive it of due process. Complainant has filed two briefs which discuss the question but both fail to articulate how the amendment would prejudice its rights under these circumstances. Accordingly, the Motion to Amend is granted pursuant to 29 C.F.R. §18.5(e).

The record shows that Dr. Suri initially retained, and subsequently paid, the law firm of Margaret Wong and Associates $4905.00 for filing fees and attorney's fees for assistance in preparing the LCA and obtaining the H-1B visa. GX 16, 17; Tr. 120-1,185). The record further shows, however, that Dr. Suri informed FHC that he had an attorney, and FHC decided that it too would use the attorney's services to prepare and file the LCA and H-1B petition. Tr. 62-64, 88-89. Thus, the

attorney provided the petition which FHC posted and prepared the LCA which Mr. Myles signed on behalf of FHC. Under these circumstances, the filing fees and the attorney's charges associated with the LCA and the H-1B petition are expenses which the regulations require the employer to pay. 20 C.F.R. § 655.731(c)(9)(iii) Accordingly, the Administrator correctly determined that Dr. Suri is entitled to reimbursement of the $3905.00 he paid for services rendered by the attorney in preparing the visa papers and the $1000.00 he paid for the filing fee.

Civil Penalty

At the hearing, FHC acknowledged that it failed to pay the $1000.00 filing fee in violation of Section 655.731(c)(10)(ii), and in its Reply Brief, it notes that 8 U.S.C. §1182(n)(2)(C)(vi)(III) and 20 C.F.R. §655.810(b)(1)(i)(v) authorize a civil penalty when an employer fails to pay the filing fee. It argues, however, that the Administrator failed to cite the statute or regulation provisions in the determination letter. FHC further contends that the Wage and Hour Officer who testified in this proceeding could not explain the reason for the penalty or justify the amount of the penalty. Compl Br. at 2-3.

Despite FHC's protestations to the contrary, the record shows that the determination letter cited the statutory authority for the Administrator's action in this matter. The first paragraph of the letter specifically references 8 U.S.C. § 1182(n) as the mandate for pursuing the specific violations alleged, while the second paragraph specifies the remedies, including the civil penalty, the Administrator imposed under the statute. Thus, Complainant received adequate notice, pre-hearing, of the basis for and the amount of the penalty and was afforded a full opportunity to conduct such discovery as it deemed warranted to establish its contention that the penalty was arbitrary or whimsical. Further, although Complainant contends otherwise, the Wage Hour Officer explained that the Employer's failure to pay the filing fee is a straightforward violation of the regulations, (Tr. 147-150), and where, as here, the violation is clear, civil penalties are routinely imposed. Indeed, Complainant has demonstrated nothing arbitrary or whimsical about a civil penalty policy triggered by the commission of an unambiguous violation of the statute and implementing regulation. Nor has it shown that a $1000.00 civil penalty imposed for a violation of the filing fee provision is arbitrary, unreasonable, unwarranted, or excessive. Accordingly:

ORDER

IT IS ORDERED that complaint filed by FHC in this matter be, and it hereby is, dismissed, and:

IT IS FURTHER ORDERED that Complainant pay to Dr. Rohit Suri the sum of $34,930.30 in back wages and cost reimbursements, and;

IT IS FURTHER ORDERED that Complainant pay to the U.S. Department of Labor, Employment and Training Administration, the sum of $1,000.00 in civil penalties.

A
Stuart A Levin
Administrative Law Judge