U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 09Oct2002

In the Matters of	**Case Nos.:**	**2001-LCA-00010**
		2001-LCA-00011
ADMINISTRATOR, WAGE AND		**2001-LCA-00012**
HOUR DIVISION,		**2001-LCA-00013**
		2001-LCA-00014
Prosecuting Party		**2001-LCA-00015**
		2001-LCA-00016
v.		**2001-LCA-00017**
		2001-LCA-00018
MOHAN KUTTY, M.D. d/b/a THE CENTER		**2001-LCA-00019**
FOR INTERNAL MEDICINE AND		**2001-LCA-00020**
PEDIATRICS, INC., et al.,		**2001-LCA-00021**
		2001-LCA-00022
Respondents		**2001-LCA-00023**
		2001-LCA-00024
		2001-LCA-00025

Appearances:

Donna Sonner, Esq.
Thomas Grooms, Esq.
Office of the Associate Regional Solicitor
Nashville, Tennessee
For the Prosecuting Party

Katherine A. Young, Esq.
Dale J. Montpelier, Esq.
Montpelier & Young, P.A.
Knoxville, Tennessee
For the Respondents

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Immigration and Nationality Act of 1952, as amended ("INA" or "the Act"), 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n), and 1184(c), and implementing regulations found at 20 CFR Part 655, subparts H and I. Under the Act, an employer may hire

workers from "specialty occupations" to work in the United States for prescribed periods of time. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 CFR § 655.700. These workers are issued H-1B visas by the Department of State upon approval by the Immigration and Naturalization Service ("INS"). 20 CFR § 655.705(b). An employer seeking to hire an alien in a specialty occupation on an H-1B visa must obtain certification from the U.S. Department of Labor ("DOL") by filing a Labor Condition Application ("LCA") before the worker is given an H-1B visa. 8 U.S.C. § 1182(n). An LCA filed by an employer must set forth, inter alia, the wage rate and working conditions for the H-1B employee. 8 U.S.C. § 1182(n)(1)(D); 20 CFR §§ 655.731 and 655.732. Upon certification of the LCA by the DOL, the employer is required to pay the wage and implement the working conditions set forth in the LCA. 8 U.S.C. § 1182(n)(2). In this case the Administrator, Wage and Hour Division, Employment Standards Administration ("Prosecuting Party" or "Administrator") alleges that the Respondents owe back wages to 17 doctors employed to work in 5 medical clinics in Tennessee, and civil money penalties, because Respondents failed to pay the wages set forth in their LCAs; discriminated against 9 of the doctors by discharging them, or constructively discharging them, in retaliation for engaging in conduct protected by the Act; failed to make documents available for public inspection; and failed to maintain required documentation. For the reasons stated below, I find the Respondents to be liable for back wages in the amount of $1,044,294.04, and civil money penalties in the amount of $108,800.00.

STATEMENT OF THE CASE

On February 28, 2001, Robert Divine, an attorney representing eight doctors, filed a complaint with the Employment Standards Administration of the Wage and Hour Division of the Department of Labor, alleging that Dr. Mohan Kutty, personally and through closely related legal entities he controlled, violated the law and regulations relating to LCAs filed in connection with employment of H-1B nonimmigrant aliens as physicians in Tennessee. He alleged that Dr. Kutty paid the doctors one third to one half the wages listed on the LCAs; presented them with impermissible employment agreements, including penalties for ceasing employment and non-competition clauses; delayed the start of payment of their wages; required them to perform additional duties; sought to prevent them from complaining through threats; retaliated against those who complained by further reducing their pay; and failed to allow public inspection of documents when requested as required by law. GX 28. By letter filed on March 22, 2001, the complaint was amended to add two additional doctors. GX 15 at 8-10; GX 25 at 7-9.

The Area Director of the Employment Standards Administration commenced an investigation which encompassed the employment conditions of 17 doctors employed by Dr. Kutty and various entities he controlled. The Administrator's Determinations were issued on April 13, 2001, finding in all of the investigated cases that the Respondents had willfully failed to pay required wage rates; failed to make available for public examination the applications and necessary documents; and failed to maintain payroll records. The Administrator also found the Respondents had discriminated against nine of the doctors for engaging in protected conduct by

terminating them, and failed to give a copy of the LCA to one worker.[1] The Determinations assessed back wages and civil money penalties. GX 30.

On April 23, 2001, Dr. Kutty authorized an appeal on behalf of himself and the various entities named in the determinations, which appeals were received timely by the Office of Administrative Law Judges ("OALJ") on April 27, 2001. The cases were assigned to me on May 7, 2001, and on May 11, 2001, I issued notices of hearing for the week of June 4, 2001. Based on the separate Determinations issued by the Administrator, when the cases were docketed, they were given 16 different case numbers, of which one contained claims relating to two H-1B employees. Respondents moved to consolidate the 16 cases into 4 groups for hearing. In her response and during a telephone conference on May 18, 2001, counsel for the Administrator argued for consolidation of all the cases for one hearing. Counsel for the ten doctors who filed the complaint with the Department of Labor filed a petition seeking leave for them to participate as parties in the proceedings before OALJ. On May 22, 2001, their petition to participate as parties was withdrawn. On May 23, 2001, I issued an Order consolidating all of the cases for hearing and confirming the schedule and other matters discussed during the May 18 conference. Additional telephone conferences addressing scheduling, motions to quash subpoenas, and other matters, were held on May 29 and May 31, 2001. A final pre-hearing telephone conference was held on June 1, 2001.

I conducted a hearing in this matter on June 4, 5, 6, 7, 8, 18, 19, 20, 21, 22, 25, 26, 27 and 28, 2001. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18. The case was not completed, and went into recess, to resume on November 26, 2001.[2]

On October 17, 2001, counsel for the Respondents filed a Notice of Intent to Withdraw as Respondents' Counsel. The Administrator opposed the withdrawal. After briefing by the parties, a telephone conference was conducted on November 16, 2001. During the course of the telephone conference, counsel for Respondents represented that Respondents had not paid their legal fees and that the Tennessee clinics had closed due to financial distress; sought permission to withdraw; and requested a continuance to allow Respondents time to retain alternate counsel.

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[1]The Administrator did not assess a penalty for the failure to provide a copy of the LCA to one of the H-1B employees, and did not address this violation in the proceeding before the Office of Administrative Law Judges.

[2]When the hearing commenced, one of the counsel for Respondents was eight months pregnant, and could not maintain a hearing schedule longer than eight hours per day. *See* the transcript of the May 29, 2001, telephone conference, at 7. The date for resumption of the hearing was set in part because of my July hearing schedule on other matters, and in part to accommodate her maternity leave from August 1 to October 31, 2001. *See* hearing transcript ("Tr.") at 2306-2311, 2423, 2474.

On November 19, 2001, I issued an Order granting permission to withdraw, rescheduling the continuation of the hearing to December 4, 2001, and requiring the Respondents to appear or show cause why they or their representatives could not appear.

Hearing resumed on December 4, 2001, and was completed on December 5, 2001. Respondents were represented at the hearing by Dr. Kutty, individually and as an officer (president) of each of the Respondent corporations, who elected to proceed without counsel.[3] Tr. at 2517, 2520-2521. Basavaraj Hooli, Administrator of the Tennessee operations, was also present. Tr. at 2517-2518.

At the hearing, I admitted Government Exhibits ("GX") 1-8, 10A, 11-30, 32-45, and 47-83, and Respondents' Exhibits ("RX") 3 (except for pp. 1-2), 4, 6 (except for p. 1), 11, 12, 15, 16, 17, 19, 20, 35, 51, 52, 59, 60, 62, 64, 65, 68, 69, 70, 71, 75, 76, 77, 82 (except for check no. 3885), 83, 84 (except for p. 1), 86, 89, 92, 94, and 98. RX 62, 69, 70 and 92 were admitted under seal as confidential trade secrets, commercial or financial information pursuant to exemption four of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and have been segregated in the record accordingly. Portions of RX 3 (pp. 1-2), 6 (p. 1), 82 (check no. 3885) and 84 (p.1), and all of RX 95, 97, and 99-103 were excluded from evidence.

In a letter dated December 10, 2001, Mr. Hooli requested that I consider some documents purportedly related to the hours worked by the doctors which had been submitted to the Department of Labor investigator but not offered at hearing due to some confusion on his part. The documents to which he referred were not submitted with the letter. Another document was attached, however. By letter dated December 19, 2001, counsel for the Administrator objected to late submission of either the documents referred to in the body of the letter, or the attachment, a type-written note addressed to Mohan Kutty with handwritten notations. I sustain the Administrator's objection, and will not consider the letter or the attachment, or records submitted to the Department of Labor investigator but not already in evidence before me.

The record was held open after the hearing to allow the parties to submit closing briefs. All parties submitted briefs by February 5, 2002, and the record is now closed.

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[3]When counsel filed their motion to withdraw, I initially took the position that the corporate Respondents could appear only by counsel. *See* Order Granting Permission to Respondents' Counsel to Withdraw as Counsel issued November 19, 2001, at 3. The OALJ rule regarding qualifications of attorneys and non-attorney representatives, however, specifically states, "No provision hereof shall apply to any person who appears on his own behalf or on behalf of any corporation . . . of which the person is a partner, officer, or regular employee." 29 CFR 18.34(g). I later inferred from this rule that a corporation is not required to be represented by an attorney to appear before OALJ, and allowed Respondents to proceed without counsel. *See* Tr. at 2517-2521. A new attorney, Ramon Carrion, assisted Respondents in filing their post-hearing brief, but did not file an appearance on their behalf. *See* the cover letter dated February 1, 2002, signed by Mr. Carrion, and the post-hearing brief, signed by Dr. Kutty and Mr. Carrion.

ISSUES

The Prosecuting Party and the Respondents each filed pre-hearing and post-hearing briefs. The parties raised the following issues in their briefs, and during the course of the hearing.

1. Whether the procedures followed in this case impermissibly violated the rights of the Respondents.

2. Whether the statute of limitations has passed for any of the violations alleged by the Administrator.

3. Whether the Respondents willfully failed to pay wages as required by the Act and regulations.

4. Whether the failure to pay required wages may be excused due to actions by the H-1B employees or other reasons.

5. Back wages due the H-1B employees.

6. Whether the Respondents retaliated against H-1B employees for engaging in protected conduct.

7. Whether the Respondents failed to maintain payroll records.

8. Whether the Respondents failed to make available the applications and other necessary documents for public examination.

9. Civil money penalties

10. Whether Dr. Kutty can be held liable individually for violation of H-1B requirements, back wages and civil money penalties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. THE H-1B PROGRAM: APPLICABLE STANDARDS

The H-1B program is a voluntary program which allows employers to employ nonimmigrant aliens admitted to the United States under H-1B visas to fill specialized jobs not filled by U.S. workers. 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n) and 1184(c). "The statute, among other things, requires that an employer pay an H-1B worker the higher of the actual wage or the prevailing wage, to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers." 65 Fed. Reg. 80110 (2000). Under the INA, as amended by the Immigration Act of 1990 ("IMMACT"), Pub. Law 101-649, 104 Stat. 4978

(1990), and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. Law 102-232, 105 Stat. 1733 (1991), an employer wishing to employ an alien in a specialty occupation is required to file an LCA specifying the wage rates and working conditions with the DOL, which must certify the LCA in order for the INS to approve an H-1B visa for the alien. Final Rules implementing administration and enforcement of the H-1B program, found at 20 CFR Part 655 Sub-parts H and I, were promulgated by the Department of Labor effective January 19, 1995. 59 Fed. Reg. 65646 et seq. (1994). Those regulations established "a system for the receipt and investigation of complaints, as well as for the imposition of fines and penalties for misrepresentation or for failure to fulfill a condition of the labor condition application." 20 CFR § 655.700(a)(4) (1995). According to the regulations, "DOL is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor condition application. The burden of proof is on the employer to establish the truthfulness of the information contained on the labor condition application." 20 CFR § 655.740(c) (1995). Upon certification of an LCA, the regulations imposed on the employer the responsibility of developing and maintaining "sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its labor condition application and the accuracy of information provided in the event that such statement or information is challenged." 20 CFR § 655.710(c)(4) (1995). As originally passed, it was a violation of the Act for the employer to fail to provide notice of the LCA to its employees, to fail to meet the wage rates or working conditions set forth in the LCA, to misrepresent a material fact in the LCA, or to fail to make the LCA and accompanying documentation available to the public. Employers violating the Act were subject to civil money penalties of up to $1000 per violation, debarment for one year, and payment of back pay to the H-1B employees. *See* Section 205(c)(3) of IMMACT.

The next significant change in the statutory provisions governing the H-1B program were the amendments contained in the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"), Title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999 (P.L. 105-277, 112 Stat. 2681 (1998)), signed into law on October 21, 1998. The ACWIA contained substantive and procedural changes to the H-1B program, including a temporary increase in the total number of H-1B visas which may be granted (effective fiscal year 1999, beginning October 1, 1998), protection against displacement of United States workers in case of "H-1B dependent employers," and expansion of the investigative authority of the Department of Labor absent a complaint by an employee, none of which provisions impact the case at hand. *See* Sections 411, 412, and 413(b), (c), (d) and (e) of the ACWIA. Section 413(a) of the ACWIA, however, increased enforcement and penalties in the H-1B program by substantially revising Section 212(n)(2)(C) of the INA, 8 U.S.C. § 1182(n)(2)(C). The amendments to Section 212(n)(2)(C) include, among other changes, (1.) a three-tier structure of increasing penalties ($1000, $5000 and $35,000) to replace the "unitary" $1000 penalty per violation previously in effect[4]; (2.) whistleblower protection for employees who disclose information that the employee reasonably believes evidences a violation, or because the employee cooperates with an investigation or other proceeding concerning the employer's

[4]*See* 65 Fed. Reg. at 80179 (2000).

compliance with program requirements[5]; (3.) and a prohibition against "benching" an H-1B employee for business reasons or due to the employee's lack of a permit or license.[6] In addition to the provisions pertaining to misrepresentation or failure to fulfill conditions of the LCAs and record keeping requirements contained in the original H-1B legislation, the Administrator seeks to enforce these new provisions against the Respondents, and to apply some of the implementing regulations adopted on December 20, 2000, effective January 19, 2001. 65 Fed. Reg. 80110 et seq. (2000).[7] In their opening statement at hearing, counsel for Respondents argued that this constitutes impermissible retroactive application of the regulations. Tr. at 41.

Although Congress specified effective dates for some sections of ACWIA, *see, e.g.,* Sections 411(b), 412(d) and 415(b), it did not do so for Section 413. Section 413 therefore became effective on the date it was signed into law by the President, October 21, 1998. *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996); *U.S. v. Bafia*, 949 F.2d 1465, 1480 (7th Cir. 1991). All of the LCAs at issue in this enforcement action were certified by the Department of Labor after October 21, 1998, with the exception of the LCA submitted on behalf of Dr. Srinivasa Chintalapudi. Dr. Chintalapudi's LCA was signed by Dr. Kutty on September 1, 1998, and certified by the Department of Labor on October 13, 1998, before the President signed ACWIA. GX 14 at 5. However, all 17 of the H-1B visas were approved after October 21, 1998, including Dr. Chintalapudi's. It is the granting of the H-1B visa which triggers the obligations of the employer to the employee, including the start of employment. *See* 20 CFR § 655.705(c)(4) (1995) and (2002).[8] The new regulations did not change the record-keeping requirements

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[5]This provision codified the anti-retaliation regulation previously found at 29 CFR §655.800(d) (1995). 65 Fed. Reg. at 80178 (2000).

[6]This provision codified the anti-benching regulation previously found at 29 CFR § 655.731(c)(5), enjoined from enforcement in *National Association of Manufacturers v. U.S. Dept. of Labor*, 1996 WL 420868 (D.D.C. 1996). 65 Fed. Reg. at 80169 (2000).

[7]Section 413(a) of ACWIA also includes new requirements that an employer offer the same fringe benefits to H-1B workers on the same basis as it offers fringe benefits to U.S. workers, and prohibiting employers from requiring H-1B employees to pay a penalty, as opposed to liquidated damages, for leaving their employment early. Although several of the doctors testified at hearing in this case that Respondents allowed their employer-sponsored health insurance coverage to lapse for some period of time, the Administrator has not alleged a violation of this provision, and there is no evidence in the record for comparison to the benefits offered to U.S. workers by the Respondents. Nor did the Administrator allege a violation of the anti-penalty provision, but see note 12 below regarding the doctors' state court suit regarding a liquidated damages clause in their employment agreements.

[8]That section originally provided: "The employer should not allow the nonimmigrant worker to begin work, even though a labor condition application has been certified by DOL, until INS grants the worker authorization to work in the United States for that employer." The same

applicable to this case; the employer has always been required to retain documentation, including payroll records, for a year beyond the end of the period of employment specified in the LCA or until any enforcement proceeding is completed. *See* 65 Fed. Reg. at 80206-80207; 20 CFR § 655.760(c) (1995) and 20 CFR § 655.760 (2002). The violations alleged by the Administrator (failing to pay wages as required, discriminating against employees for engaging in protected conduct, failing to maintain payroll records and failing to make documents available for public examination) all took place after the ACWIA was signed by the President. The INA, as amended by the ACWIA, therefore provides the standard by which Respondents' behavior should be judged.[9] Furthermore, even though the regulations were adopted two years later, to the extent that they implement the ACWIA or clarify the existing rules, they may also be applied. Their application does not raise an issue of impermissible retroactivity so long as the rules do not attach new legal consequences to events completed before their effective date. *See National Mining Association v. Dept. of Labor*, 292 F.3d 849, 859-860 (D.C. Cir. 2002). In this case, the Administrator has relied on the rules adopted in 1994, citing to the 1995 Code of Federal Regulations, as well as the new rules. Citations to the INA in this decision will refer to the INA as amended by ACWIA unless otherwise indicated. Citations to the regulations below specify the 1995 or 2002 CFR versions.

The pivotal provision of the H-1B program was enacted as part of IMMACT, and still contains the following language:

> (n) Labor condition application
>
> (1) No alien may be admitted or provided status as an H-1B nonimmigrant . . . unless the employer has filed with the Secretary of Labor an application stating the following:
>
> (A) The employer–
> (i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as [an H-1B nonimmigrant] wages that are at least–
>
> (I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

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language has been retained in the new version, but additional language has been added.

[9]The Administrator's closing brief at p. 3, n. 2, states that the ACWIA does not affect the case. However, the violations cited and penalties sought include various elements which were added to the INA by the ACWIA, including the prohibition against benching, whistleblower protection, and civil penalties of $4000 per violation, brief at p. 132. The brief is correct, however, that additional amendments to the H-1B program contained in the American Competitiveness in the Twenty-First Century Act of 2000, P.L. 106-313, 114 Stat. 1251 (2000), also addressed in the December 2000 amendments to the regulations, are not at issue in this case.

> (II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application, and
>
> (ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.
>
> . . .
>
> (D) The application shall contain a specification of the number of workers sought, the occupational classification in which the workers will be employed, and wage rate and conditions under which they will be employed. . . .

8 U.S.C. § 1182(n)(1)(A) (emphases added). The 1991 amendments added the direction that "The Secretary of Labor shall review such an application only for completeness and obvious inaccuracies. Unless the Secretary finds that the application is incomplete or obviously inaccurate, the Secretary shall provide the certification described in [this Act] within 7 days of the date of the filing of the application." 8 U.S.C. § 1182(n)(1). In language in effect since 1990, the statute also prescribes a framework for enforcement proceedings and sanctions. 8 U.S.C. § 1182(n)(2)(A) directs the Department to

> establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application submitted under [this Act] or a petitioner's misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). . . . The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

It is that investigative process which led to the letters of determination and imposition of remedies against the Respondents for the violations found by the Administrator. The specific requirements of the statute and regulations raised by the alleged violations and remedies imposed by the Administrator are addressed below.

II. SUMMARY OF THE EVIDENCE

Dr. Kutty was born in Malaysia, and educated in India. GX 1 at 4. He came to the United States in 1976, and has been practicing medicine in Florida for 20 years. He is board-certified in internal medicine, and a U.S. citizen. GX 1 at 5. He started out in fee-for-service practice, and became very successful when he began working in managed care. GX 1 at 7-9; Tr. at 2747. He wanted to show that his ideas for practice would work in a rural area, and decided to begin in Tennessee in 1998. GX 1 at 14; Tr. at 2746-2747. He was willing to subsidize the work in Tennessee with funds from his work in Florida. GX 1 at 14. His said his main concern was bringing health care to a rural area. Tr. at 2746. He decided he needed to bring in internists and pediatricians. It is difficult for pediatricians to make money, but they are needed to have total

care. GX 1 at 16; Tr. at 2721, 2746. He thought that to compensate for the lower income from primary care physicians and make his plan work, he should get other specialists such as a cardiologist and a rheumatologist. GX 1 at 16-17; Tr. at 2747-2748. A cardiologist was critical to the success of the operation, because the cardiologist's income would subsidize the primary care physicians. Tr. at 2748. He expected that the clinics would lose money for three to five years. GX 1 at 17.

The first doctor he employed in Tennessee, in Maynardville, was Dr. Ruche Gupta, who was a "green card" holder (permanent resident). GX 1 at 14-15, Tr. at 2743. Dr. Kutty entered into an employment contract with Dr. Gupta providing for $50,000 the first year, and $80,000 the second and third years, with a provision for profit sharing. The contract with Dr. Gupta provided the model for the employment contracts with the doctors involved in this case. Tr. at 2743; GX 1 at 15. Dr. Kutty expected that the doctors would become partners in the business after three years. Tr. at 2746. Between 1998 and 2000, Dr. Kutty hired 17 additional doctors and opened four additional clinics in Tennessee, two in Rogersville, and one each in Tazewell and Sneedville. Only one of the doctors (Dr. Chintalapudi) ever reached the third year of employment, GX 1 at 82, and none ever became a partner or received a share of profits. By December 2001, all of the Tennessee clinics had closed.

Dr. Kutty signed individual employment agreements with each of the doctors. *See* GX 11-27.[10] The agreements were contingent upon the employees obtaining licenses to practice in Tennessee, local hospital privileges and HMO, Medicare and Medicaid approvals necessary to receive payment for medical services under those programs. The term of employment varied from three to five years. The employees were to devote 40 hours per week to the practice of medicine, including hospital rounds and call duties. Each agreement provided for an annual salary of $80,000.00, and an incentive bonus of 25% of revenues billed for the employee exceeding $250,000. The employer was to provide suitable facilities, malpractice insurance and health insurance. Medical records were the property of the employer. The employees were entitled to two weeks of vacation and one week for continuing medical education each year. The employer reserved the right to terminate the employment without cause on 60 days' notice, or immediately for any cause listed in the agreement. Attached to the Employment Agreements as Exhibit A or incorporated in the body of the Employment Agreements were a set of "Employee Covenants" which included non-solicitation of patients, non-disclosure of the patient list and non-competition within 20 miles of any office of the employer for a two-year period, providing

[10]Comparison of the employment agreements suggests that the same agreement was used for all of the doctors except that the opening, un-numbered paragraph was modified to reflect the name of each doctor, and the address of the clinic where he or she would work were changed. Frequently the opening paragraph would specify a different clinic name or address than the one specified in the body of the agreement in paragraph 3, or than the one specified in the Employee Covenants. I conclude that these internal inconsistencies were due to clerical errors when the individual contracts were printed off a computer.

for liquidated damages of $350,000 in case of a breach of the covenants by the employee.[11]

Dr. Kutty practices medicine in Hudson, Florida, under the corporate identity, Center for Internal Medicine, Inc., a Florida corporation. Dr. Kutty and his wife, Sheela Kutty, are the only officers and directors. GX 1 at 139; GX 4. Dr. Kutty testified that his Florida administrative office handled administration for all of his Florida and Tennessee operations. An employee there, Karen Seymour, was in charge of obtaining the doctors' credentials with Medicare and other insurers. GX 1 at 72-75. Dr. Kutty made all major decisions about the clinics and hired the doctors. He decided whether and how many staff would be hired; the doctors hired the staff. GX 1 at 42-43, 46. Dr. Kutty decided how much would be put in the doctors' paychecks. GX 1 at 62. The Tennessee employees would call him or his wife with questions, but his wife had to go to him before any decisions were made. GX 1 at 46-48, 62, 73. He or his wife signed all checks. He set up his corporate organizations with the assistance of his attorney, Kalina Sarmov. GX 1 at 48, 54-56. The corporations connected to the H-1B employees in Tennessee, which operated under the rubrics of "Sumeru Health Care Group" and "Center for Internal Medicine and Pediatrics," are described below in the discussion about piercing the corporate veil.

As foreign medical students undergoing training in the United States, the 17 doctors involved in this case entered the United States on "J1" visas, which required them to return to their home country for two years upon completion of their medical education. 8 U.S.C. § 1182 (j)(1); Tr. at 69, 981. They could obtain a waiver of the requirement that they return to their home countries by showing that they would be working for three years in a geographic area which has been designated by the Secretary of Health and Human Services as having a shortage of health care professionals, an "underserved" area. 8 U.S.C. § 1184(l)(1)(D); Tr. at 69-72, 719, 981. Under the "State 20" program, each state may be allocated 20 such waivers in any fiscal year.[12] 8 U.S.C. § 1184(l)(1)(B); Tr. at 706. As doctors with a J1 waiver, they became eligible for an H-1B visa, as a nonimmigrant alien "coming temporarily to the United States to perform services . . . in a specialty occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b). The total number of H-1B visas which can be issued in any one fiscal year is limited by statute.[13] The application for a

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[11]ACWIA prohibits the imposition of a penalty if the H-1B worker ceases employment before an agreed date, but allows liquidated damages. Section 413(a) of the ACWIA, 8 U.S.C. § 1182(n)(2)(C)(vi)(I). The Administrator did not challenge this provision in the employment agreements. According to the Administrator, several of the doctors obtained an injunction restraining the imposition of the $350,000 damages clause in the case of *Vivek Venkatesh, et al. v. Mohan Kutty, et al.*, Chancery Court of Union County, Tennessee, Case No. 3965. *See* the Administrator's post-hearing brief at 6, n. 4. The deposition of Dr. Kutty entered into evidence as GX 1 was taken as part of that proceeding.

[12]The federal fiscal year runs from October 1 to September 30.

[13]For the time periods relevant to this case, those limits were 115,000 for fiscal years 1999 and 2000, and 107,500 for fiscal year 2001. 8 U.S.C. § 1184(g)(1)(A).

J1 waiver and an H-1B visa require separate applications to the INS. The J1 waiver is issued to the individual nonimmigrant and immediate family. *See, e.g.*, GX 11A at 4.

The employer submits an LCA for each employee to the Employment Training Administration of the Department of Labor for certification. Tr. at 79; *see, e.g.*, GX 11A at 2. The LCA includes the rate of pay the employee is to receive, and the prevailing wage rate and its source. Dr. Kutty signed the LCAs for all 17 doctors as the medical director of the employing corporations. GX 1 at 171; *see* GX 11-27. The LCA form promulgated by the Department of Labor contains the following declaration immediately above the signature line:

> 9. DECLARATION OF EMPLOYER: Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the information provided on this form is true and correct. In addition, I declare that I will comply with the Department of Labor regulations governing this program and, in particular, that I will make this application, supporting documentation, and other records, files and documents available to officials of the Department of Labor, upon such official's request, during any investigation under this application or the Immigration and Nationality Act.

GX 11A at 2. A representative of the DOL certifies the LCA by signing and entering the valid dates at the bottom of the form. Ibid. A copy of the certified LCA must accompany the H-1B petition. 20 CFR § 655.700(a)(3) (1995) and (2002).

The petition requesting H-1B status is also submitted by the potential employer, who submits a form (I-129) to the INS. Tr. at 72, 86-87; *see, e.g.* GX 11A at 10-12. Dr. Kutty also signed the H-1B petitions for all 17 doctors. The H-1B application has multiple signature lines, including the following statement, which Dr. Kutty also signed:

> **Statement for H-1B specialty occupations only:**
>
> By filing this petition, I agree to the terms of the labor condition application for the duration of the alien's authorized period of stay for H-1B employment.

GX 11A at 12. The INS notifies the employer of approval of the application with a form I-797, which shows the approval date and effective dates of H-1B status for the individual employee. Tr. at 86; *see, e.g.*, GX 11A at 9. The employee then leaves the country to obtain the H-1B visa stamp in his or her passport upon return to the United States. Most of the H-1B doctors in this case went to Canada or Mexico for a few days for this purpose. *See, e.g.*, GX 11A at 3, 8; GX 11H.

The employee is supposed to start work within 90 days of receiving the J1 waiver, and is obligated to work for three years. 8 U.S.C. § 1184(l)(1)(C)(ii). Once the doctor completes three years of employment in the underserved area, he or she is eligible to apply for an immigrant visa or a "green card" for permanent residency. Tr. at 988-989. Under "extenuating circumstances," a doctor can stay with the employer for less than three years if he or she obtains another bona fide

offer to complete the three-year period. *See* 8 U.S.C. § 1184(l)(1)(C)(ii); GX 15 at 13. An additional provision intended to increase the portability of an H-1B visa from one employer to another was added to the INA in October 2000. 8 U.S.C. § 1184(m); *see* Section 105 of P.L. 106-313, 114 Stat. 1251 (2000). The two-year home country residency requirement is revived for anyone with H-1B status who fails to fulfill the terms of the contract of employment in the underserved area. *See* 8 U.S.C. § 1184(l)(2)(B) and (3).

In some cases the doctors retained their own attorneys, and in other cases they used the services of Dr. Kutty's in-house counsel, Ms. Sarmov, to assist them in obtaining the necessary approvals from the INS and the Department of Labor. Ms. Sarmov also represented several of the H-1B employees directly from a private office she maintained while she was employed by Dr. Kutty. Dr. Kutty approved her doing immigration work on the side when she told him her salary was not enough, but told her to charge less than other immigration lawyers to avoid a conflict of interest; he said he later found out that she had charged more, and that some of the work she did was not on time. GX 1 at 166. Dr. Kutty said he had told some of the doctors to use Ms. Sarmov because of problems he had had with other lawyers. GX 1 at 170. Dr. Kutty testified that the five different lawyers and Ms. Sarmov who worked on the various LCAs were representing the doctors. When he signed the LCAs, he thought it was their responsibility that the information had been correctly verified. Tr. at 2745.

In March 2000 Dr. Kutty hired Mr. Hooli as the administrator of Sumeru Health Care Group, L.C. Tr. at 2699. In late 2000, Mr. Hooli became aware that the Tennessee clinics were losing money. In particular, there was a drop in the revenue from Dr. Naseem's reading echocardiograms. In August, he and Dr. Kutty visited the Tazewell clinic. When they arrived, none of the doctors were in the clinic. Tr. at 2700-2701, 2752-2753; GX 1 at 29-30. Dr. Kutty asked Mr. Hooli to investigate further. GX 1 at 30. Mr. Hooli returned to Tennessee a second time to visit the Maynardville and Rogersville clinics in the first week in September. Tr. at 2705. On a third visit in late September or October, Mr. Hooli spent about 15 days in Tennessee. He reported to Dr. Kutty that the doctors were coming in late, and returning home after seeing patients, but he did not actually ask the doctors where they were going when they left. He could not say how much time the doctors spent in the clinic on average. Tr. at 2705-2707.

All of the witnesses who were asked about billing agreed that there were lots of problems with the billing for the Tennessee clinics, which was being handled by the Florida office. Patients were being billed for things their insurance was supposed to pay, and billing was not done on time, so the insurer would delay payment or not pay at all. Tr. at 2409. Dr. Kutty admitted that he could never give the doctors an account of the volume of business they had been doing because of the problems with billing. GX 1 at 82. From the billing records they had, they could track billing related to a particular doctor, but Dr. Kutty did not know whether the print-outs were ever sent to the doctors. GX 1 at 113, 115, 208. Although Dr. Kutty accepted some responsibility for the problems, GX 1 at 21, 209, 219, he and Mr. Hooli also blamed the doctors and clinic staff. Tr. at 2708, 2722; GX 1 at 34, 208, 233. Mr. Hooli shared some documents with Dr. Chintalapudi with figures for all the clinics to September 2000 which showed that collection of bills was only at 40%, and there was a clear deficit for all of the clinics. Tr. at 2408.

Dr. Kutty and Mr. Hooli accused the doctors of lying about how many hours they were working, and did not accept the doctors' explanations, for example, that when they were not in the clinic, they had been visiting patients in the hospital. Tr. at 2715, 2753, 2762; GX 1 at 222. Dr. Kutty accused the Tazewell doctors of deliberately trying to undermine the company. GX 1 at 23. Eventually Dr. Kutty decided to withhold the doctors' salaries. He decided to release the salaries when they began seeing more patients, but then he received a letter from their attorney, Mr. Divine, demanding additional payments. Tr. at 2718, 2755-2756; GX1 at 37-38; *see* GX 33. Eight of the doctors, one from Maynardville, three in Rogersville and four in Tazewell, together had hired an attorney. On February 14, 2001, the attorney wrote a letter to Dr. Kutty on their behalf demanding payment of amounts due them, stating:

> . . . they hereby demand immediate payment of all amounts due, being the difference between the amounts previously paid and the rate of $115,000 per year as set forth in their respective employment agreements, the labor condition application ("LCA") filed with the U.S. Department of Labor, and the petition filed with the U.S. Immigration & Naturalization Service.* If you fail to tender payment of such amounts within one week from the date of this letter, the Doctors will consider their employers to be in material breach of their employment agreements and will pursue all remedies available to them under law, including notification to the U.S. Department of Labor of their employers' noncompliance with the terms of the LCA, which included your own sworn testimony of your intention to comply.
>
> You are hereby notified that the American Competitiveness Workforce Improvement Act of 1998, as amended by the American Competitiveness in the Twenty-first Century Act of 2000, prohibits an employer from intimidating, threatening, restraining, coercing, blacklisting, discharging, or in any other manner discriminating against workers who exercise their H-1B rights by complaining, even internally to the employer, about a violation of the Act or by cooperating with an investigation about possible violations.
>
> . . .
>
> * One or more of the doctors were the subject of LCAs reflecting salaries of less than $115,000/year, but the employment of other physicians under LCAs of $115,000 triggers the "actual wage" requirement, so that the other doctors must have been paid at least that amount. In addition, LCA "no benching" rules since October 1998 have required that the doctors be paid for any periods triggered by the earlier of the following: (1) the date they actually began work following LCA filing; (2) 30 days following first entry into the USA using an H-1B visa; or (3) 60 days following a change to H-1B status within the U.S.

GX 33; Tr. at 1673. None of the doctors represented by Mr. Divine was paid thereafter except for one partial payment, described below in the discussion of the individual doctors.

Dr. Kutty testified that during the same time period (January to April 2001), his Florida

operations had run into difficulty due to a change in their contracts with the insurance companies; they were not paid for a four-month period. He could not have paid the Tennessee doctors what they were asking for, even if he had wanted to. GX 1 at 38-39; 136-138. Dr. Kutty felt he had overpaid the doctors because they were working less than 40 hours, so when he got the letter from their attorney, Mr. Divine, he stopped paying them. Tr. at 2756; GX 1 at 41.

Ms. Sarmov was fired from her employment with Dr. Kutty and his various corporate entities in March 2001, when Dr. Kutty learned she had accepted a recruitment fee from one of the H-1B doctors, Dr. Munteanu. Tr. at 428, 703, 2758. Dr. Kutty contends that the reason he did not have complete files when the DOL began its investigation was that Ms. Sarmov removed some files relating to the H-1B employees when she left his employment. She told him they belonged to her, and he believed her, so he gave them to her. Tr. at 2758. When the DOL investigator came to his office to investigate, he opened all his files to her. When he was told necessary files were missing, he called Ms. Sarmov and asked her to send them by Federal Express. Tr. at 2759.

By the time of the DOL investigation, in March 2001, the finances were not good, and Dr. Kutty took out a second mortgage on his home to meet the payroll. He testified that he fired the doctors who were not meeting their obligations on the advice of the DOL investigator, Ms. Kibler, who said he could not withhold salaries, but that he could terminate employees who were not meeting their obligations. GX 1 at 193; Tr. at 2760. He kept on three of the doctors (Drs. Naseem, Rohatgi and Venkatesh) so that he would have a going concern. Tr. at 2760. They did not make any additional effort, however, and they quit their jobs. Tr. at 2761. By the time the hearing was completed, all of the clinics had closed, and none of the corporate entities were operating in Tennessee. Tr. at 2690, 2743. He did not recall how much money he had put into the operations, GX 1 at 96, but thought it was a $600,000 loss, GX 1 at 84. He had not been taking a salary from his own medical practice, and had made loans to his Florida operations, which had paid them back so he could put the money into the Tennessee operation. GX 1 at 84-86. He was the only investor in the Tennessee clinics. GX 1 at 86-88. He did not know whether funds which went to the Tennessee clinics were designated as capital or loans. GX 1 at 86. The only other financial information in the record regarding the clinics were the figures given for gross and net annual income on some of the H-1B petitions, but the basis for those figures is not in the record, so they are of little use.[14]

Both Dr. Kutty and Mr. Hooli questioned some of the doctors' policies, including discouraging walk-ins and posting notices about restrictions on prescriptions. Tr. at 2724, 2727; GX 1 at 17-18, 36. In addition to blaming the doctors for not working hard enough, Mr. Hooli

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[14]As of March 1999, the gross annual income for Maynardville and the Rogersville Main Street clinic were each given as $250,000, *see* GX 11A at 11 and GX 23 at 14. As of February 2000, the gross annual income for the (unidentified) "parent company" of the various clinics was given as $2,920,331.00, with a net annual income of $264,700.00, *see* GX12 at 10, GX 15 at 17, GX 18 at 7; GX 21 at 9, GX 24 at 13 and GX 25 at 16.

also suggested another theory why the clinics were in financial trouble. Mr. Hooli testified that there were too many doctors hired for one office. In Tazewell, with a population of 1400, with 30,000 in the county, he said there were 120 doctors. 2715-2716. Mr. Hooli shared his concern that there were too many doctors in each office with Dr. Chintalapudi. Tr. at 2396. Mr. Hooli also said he advised Dr. Kutty that he could not expect to make money from a pediatrician, because pediatricians cannot charge enough. Tr. at 2721. Dr. Kutty appeared to acknowledge that he had received such advice. *See* GX 1 at 16.

Dr. Kutty and Mr. Hooli also accused some of the doctors of earning extra money moonlighting for local hospitals. Tr. at 2712, 2718, 2723, 2763, 2765, 2778; GX 1 at 31-32. Several doctors worked in emergency rooms, but all testified that they did so at the request of Dr. Kutty, and that payment for their services went to the clinics. Their testimony is corroborated by the paperwork in evidence. In 1999, the Center for Internal Medicine and Pediatrics, P.C., by Dr. Kutty as President, entered into a contract with Emergency Coverage Corporation ("ECC") for doctors from two of the clinics (Dr. Ilie and Dr. Ionescu from the Rogersville Main Street clinic, and Dr. Venkatesh from the Tazewell clinic) to provide medical services at hospitals to which ECC provided physician staffing services. Dr. Speil and Dr. Chicos, who worked at the Tazewell clinic, were later added to the contract. GX 10A. Billing and payment records also show that payments were made to the clinics, and not to the individual doctors. GX 13 at 50-58; GX 77; GX 1 at 235; RX 93. Dr. Kutty testified that he expected that some of the patients the doctors treated at the emergency room would become their regular patients. Tr. at 44-45. Some of the doctors also testified about additional services they provided to local hospitals, with official sounding titles, but without any additional pay, as part of their practice for the clinics.

A. The Maynardville Clinic

The Maynardville Clinic was the first of the Tennessee clinics in operation. Dr. Gupta, who is not involved in this case, had a family practice there before Dr. Khan arrived to begin his pediatrics practice. Tr. at 811-812. Later Dr. Chintalapudi, an internist, joined the practice. Dr. Ahmed, a pediatrician, and Dr. Munteanu, an internist, signed employment agreements with Dr. Kutty to work there, but never started work. Clinic hours were 8:00 a.m. to 5:00 p.m. Monday through Wednesday and Friday, and 12:00 p.m. to 8:00 p.m. on Thursday. Tr. at 816, 2314. At Dr. Khan's suggestion, the clinic was also open on Saturday for a time, but that was later discontinued. Tr. at 817. Support staff included Linda Leonard, who made appointments for Dr. Chintalapudi, Tr. at 2326, and Lina Cook, who was hired as a receptionist for Dr. Khan in October 2000. Tr. at 2313. Ms. Cook was also hired to do patient billing, but that never came about. Tr. at 2318. She testified that there were problems with the billing because Florida was calculating the charges wrong and under billing. Tr. at 2319, 2328, 2333-2338.

Originally the clinic had an appointment book. Tr. at 2412-2413. Later a computer calendar print-out showed the daily appointments. Tr. at 2326, 2413. The sign-in sheet would be the most accurate reflection of the number of patients in the clinic on a given day, because it would show the walk-in patients as well as the patients with appointments. Tr. at 2326-2327, 2413, 2414. Usually there were more walk-in patients than appointments. Tr. at 2413. At the

end of the day, a daily report would be printed out to show the number of new and old patients, and the amounts paid in cash or checks. Tr. at 2415. Patient billing was initially done by a company in Knoxville. Tr. at 2420. Then it was transferred to the Florida office, which used a computer to transmit data to India to code and return to Florida. Tr. at 868, 2313-2314, 2420. The doctors marked the patient diagnoses on superbills, which were sent to Florida every Friday. Tr. at 2318, 2421. If there was a problem with billing, patients had to call Florida. Tr. at 2318-2319. Florida was undercharging for many procedures. Tr. at 2319, 2327. Employees were paid semi-monthly, at first on the 15th and the last day of the month, later changed to the 5th and 20th day of the month. Tr. at 2374, 2381.

1. Dr. Rafay Khan

Dr. Khan obtained his medical degree in Pakistan. He came to the United States in 1993. Tr. at 795. He did a three-year residency in pediatrics in New York, followed by a fellowship in allergy and immunology. Tr. at 796-797. He is board-certified in pediatrics and a Fellow of the American Academy of Pediatrics. Tr. at 798-799. A recruiter referred him for an interview with Dr. Kutty in 1998. He paid $2500.00 to the recruiting firm. Tr. at 800. Originally his employment agreement provided that he would work in Bolivar, Tennessee, but when it turned out that Bolivar was not an underserved area, he learned he would be going to Maynardville. Tr. at 801-802; GX 19 at 21, 29. He received a letter in April 1998 that Sumeru Health Group in Hudson Florida had contacted a company called HealthIMPACT to assist him in obtaining a J1 waiver.[15] Tr. at 805; GX 19 at 34. HealthIMPACT applied for a J1 waiver on his behalf, for which he paid $6000.00. He paid his attorney $7201.83 to obtain an H-1B visa. Tr. at 804-807; GX 19 at 33, 35, 36. The LCA specified a rate of pay of $99,779, which was the amount his attorney later sought on his behalf. Tr. at 807-808, GX 19 at 11; RX 15 at 538-541, 553. He moved to the Maynardville area in October or November 1998. His H-1B visa was approved on December 10, 1998, for the period from December 9, 1998, to October 10, 2001. Tr. at 809; GX 19 at 14. He reported for work on December 15, 1998. Tr. at 810.

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[15]There is little information in the record about HealthIMPACT. According to an information sheet provided to Dr. Venkatesh, HealthIMPACT, whose slogan is "Advancing Rural America's Access to Quality Health Care," is a company that represents physicians or facilities in the process of obtaining J-1 visa waivers and H-1B work permits. HealthIMPACT "has a relationship with experienced physician recruiters . . . [and] hospitals, clinics and companies throughout the United States." GX 68 at 3. Dr. Kutty testified that Michael Gregory, who was in charge of the State 20 program for Tennessee, had recommended the service to one of his employees, and that he thought it was owned by a relative or friend of Gregory's. GX 1 at 172. Correspondence in the record to and from Michael Gregory suggest that his ties to HealthIMPACT and the waiver program of the State of Tennessee Department of Health overlapped. *See* GX 19 at 31, 32. Dr. Kutty denied referring the doctors to HealthIMPACT, but thought it was possible Ms. Sarmov had. GX 1 at 175. The doctors testified variously that they were referred to HealthIMPACT by Dr. Kutty, Ms. Sarmov, recruiters or friends.

Dr. Khan had no established patients when he began working. Tr. at 812. In 1999 and 2000 he built up his practice to about 1000 of the 4000 to 5000 children in the area. Tr. at 812, 815. According to his receptionist, Lina Cook, when she started in October 2000, he was seeing about 10 patients per day, but was up to a very full schedule, about 27 per day by the time she left on March 1, 2001. Tr. at 2315, 2323. She said more than half of his patients were walk-ins. Tr. at 2317. Dr. Kutty accused Dr. Khan of refusing to accept emergency or walk-in patients, apparently based on a report from someone else. GX 1 at 17-18. I do not credit that accusation as I found Ms. Cook's testimony to be credible, and she was in a good position to know that information. Dr. Khan said he never took any time off that was not approved by Dr. Kutty or one of the associated companies. Tr. at 812. On Friday afternoons when he did not have a patient, he drove to Knoxville to attend a mosque. Tr. at 813; 2314. Sometimes he had patients to visit at Children's Hospital close to the mosque. Most of the time he was spending more than 40 hours per week at work, eventually up to 60, including hospital rounds. Tr. at 814, 816. He also conducted sports and school physicals away from the clinic. Tr. at 818. When the Tazewell clinic opened, he spent Wednesday afternoons there from 1:00 p.m. to 5:00, 6:00 or 7:00 p.m. Tr. at 819-820, 2248, 2315.

Dr. Kahn was paid a total of $1230.72 in 1998, $45,153.84 in 1999, and $71,458.27 in 2000. Tr. at 854; GX 19 at 52-54. He was one of eight doctors who retained a lawyer because they were not being paid properly. Tr. at 826. He decided to get a lawyer because he heard from Mr. Hooli that all the remaining doctors were going to be terminated, and although Dr. Kutty had promised to increase his salary, he had not done so. Tr. at 865-866. On February 14, 2001, the attorney wrote to Dr. Kutty demanding immediate payment of unpaid wages required by contract. GX 34. By letter dated February 27, 2001, the attorney filed a complaint with the Department of Labor. Tr. at 834; GX 28. The last paycheck Dr. Khan received was on February 5, 2001, for the pay period ending January 31. Dr. Kutty did not give him a reason, but he understood that Dr. Kutty stopped paying all of the doctors who complained to the Department of Labor. Tr. at 825, 829,830, 868-869. Dr. Kutty notified Dr. Khan that he was being fired by means of a letter dated March 21, 2001, which stated,

> The company has reviewed the re-imbursement from your professional services for the last six months and it is no longer feasible for May Health Care to retain your services. Your services are terminated effective immediately.

GX 19 at 37. After that, Dr. Khan received one more check in the amount of $1666.66, bringing his total for the year 2001 to $11, 666.65. Tr. at 832-833, 864; GX 19A.

Dr. Khan was interviewed during the investigation by the Department of Labor. The investigator wrote his statement, which he read and signed. Tr. at 834-835; GX 29H. Dr. Khan also provided the investigator copies of bills erroneously sent by Sumeru Health Care Group, L.C., to individual patients who should have been covered by TennCare Medicaid insurance. Tr. at 842-844; GX 19 at 59-61.

At the time he testified (June 8, 2001), Dr. Khan had signed a contract with a new

employer, Healthstar Physicians in Jefferson City, Tennessee, but had not yet started working as he was awaiting his new H-1B visa. Tr. at 855. Because his contract was due to expire in December 2001, he had started looking for work before he was fired. Tr. at 889-890. Mr. Hooli had been talking about the clinic having financial problems, and Dr. Khan had an issue because the office was not billing correctly. Tr. at 890. He pointed this out to Dr. Kutty when Dr. Kutty said he was not generating enough money. Tr. at 891.

2. Dr. Srinivasa Chintalapudi[16]

Dr. Chintalapudi graduated from medical school in India in 1992. Tr. at 2340-2341. He worked for a little while with his uncle, who is also a physician, and then did a residency in psychiatry for one year in India, which he completed in January 1995. Tr. at 2341. He then came to the United States, where he completed three years of residency in internal medicine in two different hospitals in New York. Tr. at 2342. In order to obtain a position in an underserved area, he paid $2000.00 to a recruiter who put him in touch with Dr. Kutty in December 1997. Tr. at 2343. Initially Dr. Kutty could not offer him a position because he was operating only in Florida, which was not entertaining any more J1 waivers for doctors. Tr. at 2344. Eventually Dr. Kutty offered him an employment agreement to work in Tennessee. Tr. at 2346.

Dr. Chintalapudi signed an employment agreement to work in Maynardville on April 14, 1998, for $80,000 per year. Tr. at 2346-2347; GX 14 at 10-16. The LCA listed the rate of pay and the prevailing wage at $80,000. GX 14 at 5. At Dr. Kutty's instruction, he retained HealthIMPACT America to assist with his J1 waiver, which was approved on September 3, 1998. Tr. at 2352-2355; GX 14A; GX 14B. He retained a friend as private counsel to represent him in obtaining his H-1B visa. Tr. at 2350-2351, 2356; GX 14 at 24. His H-1B visa was approved on January 8, 1999, for the period from January 7, 1999 to September 30, 2001. Tr. at 2363-2364; GX 14 at 6. He paid $6000.00 to obtain his J1 waiver, and $1000.00 to obtain his H-1B visa. Tr. at 2353-2354, 2356; GX 14B; GX 14C. His wife's visa was included with his at no extra cost. Tr. at 2357, 2406.

Dr. Chintalapudi moved to Knoxville, Tennessee on January 30, 1999, hoping to begin work on February 1. Dr. Kutty wanted him to wait because the clinic did not have all to the provider numbers and approvals and was not being paid for that reason. Tr. at 2370. Dr. Chintalapudi began working at the Maynardville clinic on February 16, 1999, on a volunteer basis. Tr. at 2365, 2371. Dr. Gupta and Dr. Khan were already working there when Dr. Chintalapudi started. Tr. at 2365. Dr. Gupta insisted that Dr. Chintalapudi be put on the payroll so he could relieve her, and Dr. Kutty agreed to pay him from February 16. Tr. at 2371. When Dr. Chintalapudi began working, he did not have privileges and approvals from all the insurance companies, so he started with the patients willing to see him without those approvals. Once he got all his approvals, he also began caring for patients in the hospital. Tr. at 2369.

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[16]Dr. Chintalapudi is often referred to as "Dr. Chinta" in the record.

Dr. Chintalapudi's W-2 for 1999 reflected a total income of $41,666.64. Tr. at 2364; GX 14 at 23; GX 79 at 1. The first three months he worked, February, March and April, he received only $1000.00 per check, with no deductions or withholding; the stubs were marked "expense check." GX 79 at 2-3. Dr. Kutty told him he would eventually receive the full $240,000 for the three year period of the employment agreement at $80,000 per year, but he (Dr. Kutty) would like Dr. Chintalapudi not to take his full salary up front because the clinic was not generating money. Tr. at 2372-2373. When asked whether he made an agreement to that effect with Dr. Kutty, Dr. Chintalapudi responded that he had no choice. Tr. at 2373. Once Dr. Chintalapudi obtained all of his approvals for TennCare and Medicare, he insisted that he be put on the payroll. Tr. at 2375. Beginning May 15, he was paid $1875.00 semi-monthly, representing a rate of $45,000 per year. Tr. at 2375-2376; GX 79 at 3-5.

When Dr. Chintalapudi started work, the clinic was not generating enough revenue to support two internists. Tr. at 2388. Dr. Kutty suggested that he and other doctors work in the emergency room to generate more revenue. In order for Dr. Chintalapudi to work in the emergency room, he had to take a course called trauma life support, which he attended in March 1999. Tr. at 2389; GX 78 at 1-2. Dr. Gupta left the clinic on August 2, 1999, after a disagreement with the company, which withheld her paycheck for taking extra vacation to visit with her family in India. Dr. Kutty told Dr. Chintalapudi that "he felt in the interest of the company is not working out with her, and he would like to let her go and would continue to employ me . . ." Tr. at 2366. Because Dr. Gupta left, Dr. Chintalapudi was busy with the practice and did not have time to work in the emergency room. Tr. at 2389. He already had about 120 patients of his own, and about 300 patients of Dr. Gupta's patients transferred to him. Tr. at 2390.

Beginning with his September 15, 1999, check, Dr. Chintalapudi's salary was increased to $3333.33 per check, an annual rate of $80,000. Tr. at 2377; GX 79 at 6-8. According to his W-2, he earned a total of $76,666.59 in 2000. The total did not reach $80,000 because sometime during the year 2000, the schedule for the semi-monthly payments changed from the 15th and the last day of the month, to the 5th and the 20th. For this reason, his last check for 2000 was not paid until January 5, 2001. Tr. at 2381; GX 14 at 22; GX 80 at 1. In December 2000, Dr. Chintalapudi raised the issue of the back payments owed on his salary with Mr. Hooli. He told Mr. Hooli he had worked hard to build the practice and put in long hours in the hospital, the office and the nursing home, and asked Mr. Hooli to convince Dr. Kutty that he deserved the back payments. Tr. at 2384. Dr. Chintalapudi told Dr. Kutty if he failed to give him a raise, he might have to leave. Tr. at 2385. Dr. Kutty told him he appreciated what he had done for the company and his hard work, and agreed to give him a raise. Tr. at 2386. In January 2001, his salary increased to $5000 per semi-monthly pay period, representing an annual salary of $120,000 per year. Tr. at 2382-2383; GX 81 at 2-5.

Mr. Hooli had been "very concerned with the finances of the company, with the amount of dollars that are being generated and the amount of dollars that are being spent." He approached Dr. Chintalapudi and told him something would have to be restructured. In late 2000, Dr. Chintalapudi called for a meeting with the other doctors, with the intention to tell them

about the financial problems and to try to meet with Dr. Kutty to see if they could come up with an agreement to restructure the company. Tr. at 2394. There was a lot of frustration among the physicians because they had not been getting their checks on time, the amount of pay they deserved, or the equipment they needed. As examples, Dr. Chintalapudi mentioned his $1000 checks when he started, and his inability to obtain a Holter monitor. Tr. at 2394. About 10 of the doctors attended the meeting. Dr. Chintalapudi explained the financial condition of the company as he understood it from talking to Mr. Hooli and the accountants when reimbursement checks, or payment for the cleaning lady, or other bills, were not paid on time. Tr. at 2397.

In December 2000, Dr. Kutty made a visit to Tennessee to speak to some of the doctors. According to Dr. Chintalapudi, Dr. Kutty

> did not even try to attend the Tazewell office to solve the differences or problems over there.
>
> At the time I did have a discussion with Dr. Kutty and in his impression, the physicians are not cooperating with him, so he did not intend to visit the Tazewell office or talk with them to resolve either the problems or differences.
>
> So he did tell me at that time that he – he told me, "Dr. Chinta, you have done things right. I'll be okay towards you. But those physicians are not cooperating to the fullest extent of the company. I will do what I have to do."
>
> Q[uestion] Did he explain to you what he meant by they weren't cooperating to the fullest extent?
>
> A[nswer] He thought the physicians are not working the full hours that they are supposed to, which means he thought that they are probably coming to the office at ten in the morning and leaving – you know, taking two-hour lunch break, leaving the office early and trying – not really devoting themselves to build a practice. That's what he felt.

Tr. at 2398-2399. Dr. Chintalapudi said that Mr. Hooli told him the same thing. Dr. Chintalapudi was aware that the doctors in the Tazewell clinic did not receive their checks in January, February and March 2001, because they told him. Tr. at 2398.

Dr. Chintalapudi was interviewed by the Department of Labor investigators. Dr. Chintalapudi testified that he had reviewed his statement before the hearing, and it was correct. Tr. at 2401; GX 29D. At the time he testified (June 27, 2001), he was still employed at the Maynardville clinic. Tr. at 2340.

3. Dr. Nazeen Ahmed

Dr. Ahmed obtained her medical degree in 1986 in India, where she also completed a postgraduate course in pediatrics in 1989. Tr. at 713. She came to the United States on a J1 visa

in 1994. She did a general medicine residency and a pediatrics residency in New York. She was a chief resident in pediatrics from July 1997 to June 1998, and had a fellowship in neonatology from July 1998 to June 1999. Tr. at 714. She was introduced to Dr. Kutty in April 1997 through a placement agency, Advance Med-Services, to which she paid an initiation fee of $2400.00, and a placement fee of $2500.00. Dr. Kutty offered her a position in Florida. Tr. at 715, 717-718, 738-739; *see* GX 11 at 17, 26. She could not start working until her J1 waiver was approved. Tr. at 719-720. An attorney, Jivan Turna, submitted her request for a J1 waiver, but it had not been approved by August 1998 because Dr. Kutty could not comply with the rules because the Florida clinic was not yet operational and did not have a lease. Tr. at 720-721, 725, 781; GX 11 at 29. She paid Ms. Turna $2500.00. Tr. at 746, 781; GX 11 at 30. When Dr. Ahmed asked for another option, Dr. Kutty suggested that she could be moved to Tennessee. Tr. at 722. She entered into a new employment agreement to work as a pediatrician at the Maynardville clinic at a salary of $80,000.00, GX 11 at 8. The LCA specified a prevailing wage rate of $84,515, and a rate of pay of $84,520. GX 11A at 2. Dr. Kutty asked her to contact HealthIMPACT to assist with her J1 waiver. Tr. at 723. She paid HealthIMPACT $7000.00 to obtain the J1 waiver. Tr. at 723-724, 725, 780; GX 11 at 25, 28. Ms. Sarmov filed the petition for an H-1B visa on her behalf. Tr. at 726. Ms. Sarmov did not charge Dr. Ahmed a fee. Tr. at 747. Dr. Ahmed went to Toronto on June 26, 1999, to obtain the visa. She expected to be there less than a week, but Ms. Sarmov had sent the original J1 waiver to the INS by mistake. Dr. Ahmed had to have the original waiver with her in Toronto in order to get her visa. For that reason, she ended up having to spend 25 days in Toronto. Tr. at 735. The H-1B visa was approved on May 16, 1999, for the period from May 15, 1999, to January 9, 2002. GX 11A at 9.

Dr. Ahmed moved with her daughter to Knoxville, Tennessee on August 3, 1999, in order to start her job in Maynardville, but she never began the job. Tr. at 739, 744. At first Dr. Kutty told her she must get approvals from all insurance agencies and hospital admitting privileges. Tr. at 739-740. Dr. Chintalapudi testified it was his understanding that the clinic was not generating sufficient funds to support two pediatricians, so Dr. Kutty decided to wait to an appropriate time. Tr. at 2400. Dr. Ahmed had started the credentialing process in May 1999, and received them all by September. When she notified Dr. Kutty that she had all her credentials in October, however, he told her there was no position for her in Maynardville, Tr. at 740, and that she should try to come to Florida, Tr. at 742. By that time she was trying to find another position in Tennessee, but she initially agreed to go to Dundee, Florida. Tr. at 743. Other than two weeks she covered at the Maynardville clinic for Dr. Khan, who was out of the country on vacation, she had no work during the time she had been living in Knoxville. Tr. at 743-744. Dr. Kutty refused to give her anything for support until she agreed to go to Dundee, when he gave her $1000.00 each month for November and December 1999 and January 2000. Tr. at 744-745; GX 11E. $3000.00 was the total amount she received from Dr. Kutty or his companies. Tr. at 745. She had no other income until she left Knoxville on June 1, 2000. In the meantime she lived on her savings, credit cards, and a loan from her brother. Tr. at 248.

When Dr. Ahmed agreed to go to Florida, Ms. Sarmov began the process to transfer her to Florida. Tr. at 750. The record contains a copy of the INS approval of her H-1B visa for the Dundee clinic dated January 13, 2000. GX 11 at 24. Because of the problem caused by Ms.

Sarmov's mistake with the paperwork on the first H-1B visa, Dr. Ahmed also consulted with another immigration attorney, who advised her she could not move from one state to another without permission, especially because she had been given her J1 visa through the State 20 program in Tennessee. Tr. at 752. She was interviewed and offered another job in Martin, Tennessee, for the Methodist Health Care Martin Pediatric Clinic which she accepted on January 22, 2000. Tr. at 752-753; GX 38. The Tennessee Department of Health agreed that the new area was also underserved. Tr. at 753. In February, on the advice of her attorney, Dr. Ahmed wrote a letter to Dr. Kutty asking to be employed in the Maynardville office, and advising him that she would not be able to work at any other site due to the restrictions of her approved waiver application. Tr. at 756; GX 11L at 1. When she had no reply, she wrote a second letter. Tr. at 758; GX 11L at 2. She did not expect to work in Maynardville, but her attorney wished to elicit a termination letter from Dr. Kutty. Tr. at 760. She did not notify Dr. Kutty or anyone at his company that she had accepted another job. Tr. at 778. On March 3, 2000, Dr. Kutty replied to her letters as follows:

> Due to business reasons and with your consent you were transferred to another medical clinic of the company located in Health Professional Shortage Area. You have failed to comply with the newly approved by the Immigration and Naturalization Service H-1B petitions, and to commence employment at Dundee Medical Walk In Clinic accordingly.
>
> This letter serves as a notice to you to commence employment within 10 days of this letter. In case you fail to comply with this notice you should consider this letter as notice of termination of your employment agreement with Sumeru Health Care Group d/b/a Center for Internal Medicine and Pediatrics.

GX 11L at 4. The INS approved transfer of her H1B visa to the Martin Clinic on May 25, 2000, and she began work on June 4, 2000. Tr. at 753-754; RX 59 at 30-31. At the time she testified (June 7, 2001), she was still working in Martin, Tennessee. Tr. at 712.

During the Department of Labor's investigation, Dr. Ahmed was interviewed by telephone. GX 29A.

4. Dr. Dragos Munteanu

Dr. Munteanu graduated from medical school in Bucharest, Romania in 1995. He came to the United States in 1997. Tr. at 664. He completed a residency in internal medicine in Ohio on June 30, 2000. Tr. 665. He began looking for a position in an underserved area at the end of his second year, in order to obtain a J1 waiver, and came across an advertisement in the New England Journal of Medicine. Tr. at 665-666. When he sent his curriculum vitae, he was contacted by Kalina Sarmov. Dr. Munteanu entered into a Placement Agreement with Ms. Sarmov's company "MedElite, Inc." in which he agreed to pay $3000.00 in exchange for an agreement to secure practice opportunities. Ms. Sarmov interviewed him in Florida in her capacity as general counsel for Dr. Kutty. Tr. at 666-671; GX 21A and B. Dr. Munteanu

entered into an employment contract to work at the Maynardville clinic[17] for an annual salary of $80,000.00. Tr. at 671-672; GX 21 at 11-18. The LCA listed a prevailing wage rate of $102,627. GX 21 at 5. In order to obtain his J1 waiver, he signed an agreement with HealthIMPACT America, for which he paid $7000.00. Tr. at 674-675; GX 21C and D. He signed a Retainer Agreement with Ms. Sarmov to obtain his H-1B visa for $4000.00. Tr. at 626. GX 21E. After he paid the first installment of $1500.00 to Ms. Sarmov for his H-1B visa, she notified him that she would apply a portion of the recruitment fee for the balance of the fee ($2500.00) for the H-1B visa. Tr. at 676-677; GX 21E, F and G. Although his J1 waiver was granted, GX 21 at 7, he did not receive the H-1B visa immediately because when Ms. Sarmov filed his application, she had missed the cap for that year. Tr. at 678. She reapplied, and Dr. Munteanu was approved for his H-1B visa on August 29, 2000, effective October 1, 2000. Tr. at 679; GX 21 at 6. Ms. Sarmov also represented Dr. Munteanu's wife, but the fees he testified to having paid were only for him. Tr. at 688-689.

Dr. Munteanu spoke to Dr. Kutty many times about when he could start work. After Dr. Munteanu got his H-1B visa, Dr. Kutty kept postponing his start date by saying he had to get his approvals from Medicare, Medicaid and insurance companies. Tr. at 680. Dr. Munteanu had moved to Knoxville with his wife in September so he would be ready to start work in October. Tr. at 681-682. He never began work for Dr. Kutty, and had no other employment. Tr. at 682. He obtained his Tennessee medical license on September 28, 2000. Tr. at 685. Once he had gotten his insurance approvals, Dr. Kutty told him he was restructuring, had financial problems with the other doctors in Tazewell, and wanted to draft a new contract. Tr. at 683-684. On February 27, 2001, Dr. Kutty sent Dr. Munteanu a fax which stated,

> Unfortunately, because of the restructuring which is currently taking place in our Tennessee medical offices, we will have to delay your employment until April 15, 2001. I know that these changes will result in a more efficient and viable healthcare organization in which to practice and develop professionally.

GX 21H. Dr. Munteanu responded with a letter dated March 1, 2001, asking to be allowed to start work immediately. Absent a response within one week, his letter said he would consider the employment agreement to be void. Tr. at 684-686; GX 21I. After March 15, 2001, he secured a position with Summit Medical Group in Knoxville, Tennessee, and expected to begin work as soon as his new H-1B visa was approved. Tr. at 686-687. The state agency assisted him with his transfer from one underserved area to another. Tr. at 705, 706.

Dr. Munteanu provided a statement to the Department of Labor during its investigation. The investigator wrote the statement, and he read and signed it. There were some mistakes in the written statement which he corrected during his testimony. Tr. at 689-691; GX 29J.

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[17]The Maynardville clinic is identified in the opening paragraph of the agreement; the Tazewell clinic is identified in the body at ¶ 3. It appears from Dr. Munteanu's testimony that Maynardville was intended. Tr. at 680.

B. The Rogersville Main Street Clinic

The first clinic in Rogersville, located on West Main Street, opened May 3, 1999. It was staffed by Drs. Ilie and Ionescu, both internists; Margaret Price, the office manager, later replaced by Doris Williams; and Mary Laster, a medical assistant. Dr. Qadir, a pediatrician, and Jan Drinnon, front office assistant, joined the clinic the following year. Tr. at 1350, 1368, 1401, 1470-1471. An LPN, Teresa Hurd, was hired in January or February of 2001. Tr. at 1471. Clinic hours were from 8:00 a.m. to 5:00 p.m., with an hour for lunch from 12:00 to 1:00. Tr. at 1351, 1402, 1474. The practice started with no patients, and was eventually built up to over 2000 patients. Tr. at 1352. A computer print-out listed the appointments each morning. Tr. at 1356, 1367-1368, 1405, 1494, 1655, 1754; RX 65. The appointment book would not reflect all of the work done by the doctors. Tr. at 1755. The most accurate record of the patients seen in a day was the sign-in sheet, which would include walk ins and call ins. Tr. at 1356, 1369-1370, 1404, 1760. Later a spreadsheet was developed to include that information along with information for billing. Tr. at 1475-1476,1527. The "daily board" sheets listing the patients, procedures and co-pays, were printed out at the end of each day and faxed to Sumeru in Florida. Tr. at 1407, 1656, 1760. Patient billing was handled by the Florida office. Tr. at 1354, 1406. That included billing for patients treated in the hospital. Tr. at 1779.

1. Dr. Ionut Ilie[18]

Dr. Ilie obtained his medical degree in Romania in 1991, and did an internship and residency in orthopedic surgery there until 1995 when he passed the U.S. equivalency examination for foreign medical graduates. Tr. at 1575-1577. He and his wife, Dr. Madalina Ionescu, came to the United States on J1 visas to begin residencies in internal medicine in Chicago on July 1, 1995. Tr. at 1577. He became board-certified in internal medicine in August 1998. Tr. at 1577-1578. They began looking for positions in an underserved area during their residencies, sending their curriculum vitae in response to advertisements in medical journals. Tr. at 1578-1579. In April 1998, they were invited to Florida to interview with Dr. Kutty. Tr. 1580. Dr. Kutty told them he was planning to open offices in eastern Tennessee, and offered them positions in Tazewell. Tr. at 1581.

Dr. Ilie signed an employment agreement effective June 5, 1998, to work in Tazewell, Tennessee,[19] for an annual salary rate of $50,000 for the first six months, and $80,000 per year thereafter. Tr. at 1582-1583; GX 16 at 23-27. That contract never resulted in employment. Tr. at 1584,1585. In January 1999, Ms. Sarmov called to say that the original location was not available, but that a different location had been found. Tr. at 1595. Dr. Ilie signed a second employment agreement, mailed by Ms. Sarmov, effective March 15, 1999, changing the location

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[18]Dr. Ilie is sometimes referred to as "John" in the record.

[19]The agreement specified Bolivar. Dr. Ilie testified that he thought that Bolivar was identified in error, and the contract should have said Tazewell. Tr. at 1598.

of work to Rogersville, and the salary to $80,000 per year. Tr. at 1582, 1584; GX 16 at 15-22; RX 68. The LCAs for both locations specified a rate of pay of $80,000, with a prevailing rate of $52,291 per year. GX 16 at 9 and 35. Dr. Ilie and his wife retained HealthIMPACT to obtain their J1 waivers in the State 20 program. Tr. at 1585-1586, GX 16 at 26. They retained an attorney in Chicago to file their H-1B petitions. Tr. at 1591; GX 16 at 12. Dr. Ilie's first H-1B petition was approved on February 3, 1999, for the period from February 2, 1999, to December 1, 2001. GX 16 at 11. In order to change the location of work, he was required to apply for a new H-1B visa. Tr. at 1591. His second H-1B petition was approved on May 7, 1999, for the period from May 5, 1999, to March 1, 2002. GX 16 at 10. He paid $6000.00 for his J1 waiver, $2643.30 for his first H-1B visa, and $2626.30 for his second H-1B visa. Tr. at 1586-1587, 1592-1594, 1616-1617; GX 16 at 28-32, 66.

Dr. Ilie and Dr. Ionescu moved to Rogersville in April 1999. Dr. Ilie was available for work as soon as his second H-1B visa was approved. Tr. at 1600. He actually started work with patients on May 3, 1999, two days before his H-1B visa was approved. Tr. at 1601, 1625. In order to get ready for the opening of the clinic, the office had to be arranged. Tr. at 1620. The new practice had to acquire equipment and supplies, and they held an open house on April 26. Tr. at 1623. There were no patients when the clinic opened. Dr. Kutty had bought the charts of the doctor who used to work there before he retired. Tr. at 1621. The charts were of minimal use because the patients had been advised of the retirement six months in advance. Tr. at 1622. In order to attract patients, they placed advertisements in the local newspaper, got privileges at the local hospital, met local doctors, and received help getting the word out from the owner of the building, who was the local pharmacist. Tr. at 1624. Things were very slow at first. Tr. at 1625. Dr. Ilie was at the clinic 40 hours or more a week. They started checking the old patient files. Tr. at 1626. They reviewed medical journals, continued fixing problems in the office, and underwent the credentialing process with the insurance companies. As the practice grew, they used their hospital admitting privileges. Tr. at 1629. They went to the hospital every morning at 8:00 a.m. and afternoon at 5:00 or 6:00 p.m. if they had patients there. Tr. at 1629-1630. They shared on-call duty with seven doctors, so each was on call for the emergency room one weekday night in seven from 5:00 p.m. to 7:00 a.m., and one weekend in seven from Friday at 5:00 p.m. until Monday at 7:00 a.m. Tr. at 1634, 1636. Dr. Kutty entered into a contract with the Emergency Coverage Corporation for Drs. Ilie and Ionescu to provide those services. GX 10A. They were the only internists on the rotation. Tr. at 1646. Being on call helped their practice by leading to consults from the local surgeon and having a good relationship with other doctors. Tr. at 1635, 1645. They also read electrocardiograms for the surgeon. Tr. at 1647-1648. They also took on unattached patients admitted to the hospital on rotation with the other doctors. Tr. at 1637-1640. Every active doctor had to be part of hospital committees to satisfy the requirements of Medicare and the Joint Commission of Hospital Accreditations. Dr. Ilie was the chief of the respiratory department. Tr. at 1649. That position required him to review the bylaws and standing orders for protocols for ventilators and other equipment. Tr. at 1650. They also saw patients in a nursing home which they visited on Wednesday afternoons from 2:00 or 3:00 to 5:00. Tr. at 1642. The number of patients increased steadily to the point where Dr. Ilie and Dr. Ionescu together had 2500 patients. Tr. at 1632. Dr. Ilie estimated that he worked between 50 and 60 hours a week, excluding on call time. He always took charts home to write. Tr. at 1652.

Dr. Ilie was not compensated for the work he did to get the clinic ready to open. Tr. at 1624. His first paychecks, for the month of May 1999, were based on an annual rate of $80,000. Once his wife started to work, however, his paycheck was cut in half. Tr. at 1601; *compare* GX 16 at 48 and 51. He did not inquire why his pay was cut, because the first contract he had signed provided for a salary rate of $50,000 for the first six months, and the other physicians working in Maynardville had told him that they, too, were receiving only half their salary. Tr. at 1608, 1610. The checks written to him for May bounced, but those checks were replaced. Tr. at 1604-1605; GX 16 at 49-50. Around November 1999, Dr. Ilie and Dr. Ionescu called to inquire about their salary. Dr. Kutty told them he would check the record to see how the clinic was doing. In December, Dr. Kutty called back, said that he had checked the accounting department and the clinic was doing well, and that he would increase their salary to $60,000 per year. Tr. at 1611. Dr. Kutty said nothing indicating that he was not pleased with their work. Tr. at 1612. In July 2000, after another call to Dr. Kutty, Dr. Ilie's salary increased to the full contract rate of $80,000. Tr. at 1613-1615; GX 16 at 59. Dr. Ilie earned $29,999.93 in 1999, and $66,666.63 in 2000. GX 16 at 64. There was no extra compensation for work at the hospital or nursing home. Tr. at 1648-1649.

Dr. Ilie had concerns about whether the clinics were being run as they should. Tr. at 1664. The rent, utilities, cell phone and pager bills and health insurance premiums were paid late, and service was interrupted. Tr. at 1665-1666. There were many errors in billing which Dr. Ilie pointed out to Dr. Kutty. Tr. at 1663. Dr. Ilie attended the meeting called by Dr. Chintalapudi in Tazewell in late 2000 with about twelve doctors. Tr. at 1667. At the meeting, Dr. Chintalapudi talked about the financial situation of Sumeru and the billing, and said that if things went on the same way, Dr. Kutty would not pay their salaries. Tr. at 1668. Dr. Ilie was concerned because it would be a financial burden, and it would affect his immigration status. Tr. at 1669. Dr. Ilie always looked upon Dr. Chintalapudi "as the unofficial leader of the Tennessee operations. He was the physician with the most contacts with Dr. Kutty, business and personal contacts. So in the previous year and a half, whatever he told us was fairly accurate." Tr. at 1708.

The second paychecks in January 2001 were half of what he and his wife had been receiving, Tr. at 1658 and 1670, and were delivered a week late by Mr. Hooli. When Dr. Ilie asked why, Mr. Hooli referred them to Dr. Kutty. Tr. at 1660. Dr. Ilie and Dr. Ionescu tried to call Dr. Kutty at home about 50 times, but he never answered. Tr. at 1669-1670. He also tried to reach the company accountant, Ellie Hollis, who told him he had to speak to Dr. Kutty. Tr. at 1670-1671. He and his wife kept in touch with the other doctors and were aware that the Tazewell doctors were not being paid at all. Tr. at 1672. He was one of the eight doctors who hired Mr. Divine. Tr. at 1673.

Two weeks after Mr. Divine wrote the letter demanding salary payments, on March 2, 2001, Dr. Kutty wrote a letter to Dr. Ilie which stated:

> We have conducted an extensive investigation of medical activity at the Rogersville facility. As a result of this investigation, we have determined that you have failed to

> devote forty hours per week to the practice of medicine as required by your contract with the Center for Internal Medicine and Pediatrics, Inc. This constitutes undue absenteeism under paragraph 10.12 of your contract.
>
> You have also refused to see patients on an emergency basis at the clinic. This is failure to faithfully and/or diligently perform your usual and customary duties under your employment agreement as set forth in paragraph 10.07.
>
> Although we could terminate this agreement immediately for excessive absenteeism under paragraph 10.12 or failure to faithfully and/or diligently perform your usual and customary duties of employment. Instead, we will begin withholding your salary for a sufficient period of time to reimburse the Center for your failure to comply with our agreement under paragraph 3 which requires that you devote 40 hours per week to the practice of Primary Care at (Internal Medicine) The Center For Internal Medicine and Pediatrics.

GX 16 at 34. Dr. Ilie referred to this as "the retaliation letter from Dr. Kutty . . . Because it was obviously, that he was trying to find reasons not to pay us." Dr. Kutty had never told Dr. Ilie that he believed Dr. Ilie was not working 40 hours a week or refusing to see patients at the clinic on an emergency basis. Tr. at 1676. The letter accusing Dr. Ilie of misconduct was not unexpected, because three doctors in Tazewell had already received similar letters. Tr. at 1691. At Dr. Ilie's request, several staff members wrote letters of support for him, denying any suggestion that he was less than diligent, including Margaret Price and Doris Williams[20], office managers, GX 16 at

[20]Dr. Kutty called Ms. Williams as a witness and attempted through her testimony to establish that the doctors at the Rogersville clinic were working less than 40 hours per week. *See* Tr. at 2656-2660. The letter she wrote for Dr. Ilie, however, stated that he worked more than 40 hours. GX 43. She testified that she said that in the letter, because the doctors would not accept a letter that did not say that, Tr. at 2678, but she honestly did not know how many hours the doctors worked, Tr. at 2681.

37-38 and GX 43; Mary Laster,[21] medical assistant, GX 16 at 39-40; and Jan Drinnon,[22] front office assistant, GX 16 at 41. Tr. at 1677-1680, 1689-1691. In addition the record contains letters of support from the Mayor of Rogersville, GX 16 at 42, the Chief of Staff of the county hospital, GX 16 at 43, a surgeon, GX 16 at 44, a doctor from East Tennessee University, GX 16 at 45, and 20 staff members of the county hospital, GX 16 at 46.[23] Tr. at 1680-1683, 1691.

Dr. Ilie was terminated from employment on March 21, 2001. His termination letter from Dr. Kutty stated,

> The company has reviewed the re-imbursement [sic] from your professional services for the last six months and it is no longer feasible for Maya Health Care to retain your services. Your services are terminated effective immediately.

Tr. at 1685; GX 16 at 33. He earned a total of $8333.32 in 2001 for the period from December 15, 2000, to March 21, 200l, GX 16 at 47, receiving no paychecks after February 5, 2001, although he continued to work until he was terminated. Tr. at 1673-1675, 1685, 1695-1696. He

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[21]Ms. Laster testified at the hearing. Tr. at 1349 et seq. She worked at the clinic from April 1999, before it opened, until April 2001. She said both Dr. Ilie and Dr. Ionescu worked every day except for vacation, and two times Dr. Ionescu went home with a migraine. They both made hospital rounds at 7:00 or 7:30, and when they finished at the clinic in the afternoon. They attended board meetings, and continuing medical education. They took walk-in patients. They started practice with no patients, and ended with over 2000. The other doctor in the clinic, Dr. Qadir, was always on call as a pediatrician. He worked after 5:00 many days. Tr. at 1351-1353. One of her paychecks bounced and several were one or two days late. Tr. at 1356; GX 42. Once the phones were cut off for nonpayment of the bill. The first janitor quit because of nonpayment. The rent was not paid, and the lease was eventually terminated. Tr. at 1359.

[22]Ms. Drinnon testified at the hearing. Tr. at 1401 et seq. She worked at the clinic from June 2000 to April 2001. She testified favorably about all the doctors, and said the accusation that they were working less than 40 hours was untrue. Tr. at 1411. She left her employment because she was "disgusted with how Dr. Kutty had been treating the doctors, and didn't have any trust in the company any longer . . ." Tr. at 1419.

[23]Peggy Murrell, the director of nursing at Wellmont Hawkins County Hospital, testified at the hearing. Tr. at 497 et seq. She said Drs. Ilie and Ionescu are among the 11 or 12 active medical staff at the hospital. Tr. at 502. Ms. Murrell testified that she drafted the letter of support, GX 16A (the same letter also appears at GX 16 at 46), which she circulated for signatures at the hospital. Tr. at 503-505. The letter states that the doctors contact the hospital daily before their office hours begin to learn of new patient admissions; provide on call coverage; accept admissions of unattached patients; make patient rounds twice daily; consult as requested on patients of other doctors; respond quickly to pages; "are an asset to our Medical Staff and to the community"; and have "unquestionable" professionalism and business practices.

received one final check on April 6, 2001, in the amount of $1667, for one week's work, bringing his total earnings from Sumeru to $9999.98 in 2001. Tr. at 1696; GX 44 at 3.

Around the end of January 2001, Dr. Ilie had begun talking with local clinic administrators to find out if there were any employment opportunities. When he told them he was still under contract, they declined to discuss details with him. Tr. at 1710. About a week before he was terminated, expecting his employment with Sumeru to come to an end, he called TennCare representatives to inquire about his ethical obligations. They suggested he stop accepting new patients. He called again when he was terminated, and was told he should notify his assigned patients by letter. Tr. at 1715-1716. As Florida would not authorize letters, he joined with Dr. Ionescu and Dr. Qadir in publishing an ad in the local newspaper. Tr. at 1716-1717. At the time he testified (June 21, 2001), he had begun employment with HealthStar Physicians in Rogersville. Tr. at 1712. A copy of his new employment agreement was admitted into evidence under seal as confidential trade secrets, commercial or financial information, marked RX 69. Tr. at 1711-1712.

With the assistance of counsel, Dr. Ilie and Dr. Ionescu filed a complaint with the Department of Labor. Tr. at 1693; GX 16 at 5-8, 68-70. He and his wife gave a statement during the investigation which was written down by an investigator; Drs. Ilie and Ionescu then read and signed it. Tr. at 1693-1694; GX 29F. Dr. Ilie corrected two errors in the statement during his testimony. Tr. at 1694-1695.

2. Dr. Madalina Ionescu

Dr. Ionescu's medical career paralleled that of her husband, Dr. Ilie. Tr. at 1579. She obtained her medical degree in Romania in 1991, did residencies in orthopedics and endocrinology, and came to the United States for a residency from July 1995 to June 1998. Tr. at 1723. She is board-certified in internal medicine. Tr. at 1724. In April 1998, they were invited to Florida to interview with Dr. Kutty. Tr. 1580, 1725. Dr. Kutty told them he was planning to open offices in eastern Tennessee, and offered them positions in Tazewell. Tr. at 1581, 1726. They also met Mrs. Kutty and Ms. Sarmov on that trip. Tr. at 1726.

Like Dr. Ilie, Dr. Ionescu signed an employment agreement effective June 5, 1998, which never resulted in employment, to work in Tazewell, Tennessee, for an annual salary rate of $50,000 for the first six months, and $80,000 per year thereafter. Tr. at 1726; GX 17 at 37-41. Nine months later, she signed a second employment agreement, effective March 15, 1999, changing the location of work to Rogersville, for $80,000 per year. Tr. at 1728-1729; GX 17 at 17-24; RX 68. The LCAs for both locations specified a rate of pay of $80,000, with a prevailing rate of $52,291 per year. GX 17 at 11 and 35. Dr. Ionescu's first H-1B petition was approved on February 24, 1999, for the period from February 23, 1999, to December 1, 2001. GX 17 at 13, 14. She was available to go to work when her first H-1B was approved. Tr. at 1817. Her second H-1B petition was approved over a month later than Dr. Ilie's, on June 22, 1999, for the period from June 21, 1999, to March 1, 2002. Tr. at 1601, 1732-1733; GX 17 at 12. She paid $6000.00 to HealthIMPACT for her J1 waiver, $2610.00 to the attorney for her first H-1B visa, and

$2610.00 for her second H-1B visa. Tr. at 1727, 1729-1732; GX 17 at 25-29.

Dr. Ionescu and Dr. Ilie had no income between June of 1998 and May of 1999 when Dr. Ilie started working at the Rogersville clinic. They lived on their savings during that period. Tr. at 1729. Dr. Ionescu began working at the clinic on May 5, 1999, on a volunteer basis, and beginning July 1, 1999, after her H-1B visa was approved, for salary. Tr. at 1735, 1740-1741. They had no patients at the start, 900 after less than a year, and around 2600 patients on the computer at the time they were fired. Tr. at 1741. Like Dr. Ilie, Dr. Ionescu had privileges at the county hospital and participated in the on-call group, accepted referrals of unattached patients, provided consultations for the surgeon, and read pre-operative EKG's, as well as conducting rounds twice a day and visiting the nursing home for her own patients. Tr. at 1743-1752, 1757. She was on the infectious disease committee of the hospital. Tr. at 1778. She did not receive any pay from the hospital. Tr. at 1779. She always worked at least 40 hours per week, and probably 50. Tr. at 1760-1761. Dr. Ionescu gave a similar account to Dr. Ilie's regarding the problems with the clinic, including the various unpaid bills, and attended the meeting with Dr. Chintalapudi and the other doctors in Tazewell. Tr. at 1765-1766. Mr. Hooli came to the clinic a few times in late December and January and said that the Tennessee operation was losing money. Tr. at 1763, 1805.

Dr. Ionescu's first check of $1666.67, issued July 15, 1999, represented an annual rate of $40,000.00. Tr. at 1736; GX 17 at 45. Dr. Kutty was in Rogersville at the opening of the clinic, and told them that for while, until they had more patients, he would pay them less than the contract stated. Tr. at 1737. She was paid at the $40,000 rate until December 1999, when her rate went to $60,000, and then to $80,000 in July 2000. Tr. at 1736; GX 17 at 44-57. During telephone conversations with Dr. Kutty, Dr. Kutty said he was happy with the Rogersville clinic. Tr. at 1739. He did not criticize their work. Tr. at 1740. Dr. Ionescu earned a total of $20,000.02 in 1999, and $66,666.63 in 2000. Tr. at 1735; GX 17 at 42. On January 19, 2001, like Dr. Ilie, Dr. Ionescu received a check for half the usual amount from Mr. Hooli. Tr. at 1761-1762, 1766; GX 17 at 43. Dr. Ionescu confirmed Dr. Ilie's testimony that they were unable to reach Dr. Kutty for an explanation. Tr. at 1762. Her next check was for the full amount. Tr. at 1766. She received $8333.32 for the period from December 16, 2001 to January 31, 2001, GX 17 at 43, and one final check on April 5, 2001 for $1666.66, bringing her total earnings in 2001 to $9999.98, GX 44 at 3. Tr. at 1768.

Dr. Ionescu was one of the eight doctors referenced in the letter from the attorney to Dr. Kutty dated February 14, 2001, demanding payment of salary at $115,000 per year. Like Dr. Ilie, she received a letter from Dr. Kutty dated March 2, 2001, alleging that she had failed to work 40 hours and refused to see patients on an emergency basis, and stating that her salary would be withheld. Tr. at 1769-1770; GX 17 at 34. Although she was not being paid, she continued to work full time in the clinic until she was discharged from employment. Tr. at 1767-1768. On March 21, 2001, she received a letter from Dr. Kutty terminating her employment, worded exactly the same as the termination letter to Dr. Ilie. Tr. at 1767; GX 17 at 33. She, too, requested and received letters of support from clinic staff and persons in the community. Tr. at 1770, 1773, 1776-1777; GX 17 at 58-67; GX 45. She participated in the complaint filed with the

Department of Labor, and read and signed the statement taken by the investigator. Tr. at 1774, 1779-1780; GX 17 at 5-10. At the time she testified (June 21, 2001), she had begun employment with Wellmont Health System in Rogersville. Tr. at 1810. A copy of her new employment agreement was admitted into evidence under seal as confidential trade secrets, commercial or financial information, marked RX 70. Tr. at 1809-1810. She began seeing patients at Wellmont on April 23, 2001. Tr. at 1810; RX 71.

3. Dr. Maqbool Qadir

Dr. Qadir received his medical degree in Pakistan in 1989, followed by six months' work in internal medicine, and six months in surgery. Tr. at 1430. Then he had a family practice in a private clinic in Pakistan until he came to the United States in 1992 to do a pediatrics residency in New York. Tr. at 1431. He finished his pediatrics residency in 1995, and then undertook a three-year fellowship in neonatal/perinatal medicine. Tr. at 1432. He completed his fellowship in June 1998, and passed the examination to become board-certified in pediatrics. Tr. at 1433-1434. During the final year of his fellowship, he began looking for jobs in underserved areas to obtain a J1 waiver. Tr. at 1434. Initial attempts through a recruiter were unsuccessful, so his family returned to Pakistan while he stayed with a friend in Tennessee. Tr. at 1435-1436. Eventually the recruiter put him in touch with Dr. Kutty. Tr. at 1438. In a telephone conversation, Dr. Kutty offered him a position in Tennessee, to be paid at the rate of $50,000 per year for the first six months when he would not be seeing very many patients, to increase to $80,000. Tr. at 1439. Dr. Qadir was next called by Ms. Sarmov, who told him they did not yet have an office in the area and were looking for office space, and asked him to look in Rogersville. Tr. at 1440. He located a possible office space in a former insurance office, but was told that Dr. Kutty was negotiating with a physician's office. Tr. at 1441. The office eventually opened in May 1999 in a facility at 900 West Main Street in Rogersville. Tr. at 1469.

Dr. Qadir signed an employment agreement effective January 18, 1999, to work at the Main Street clinic in Rogersville for an annual salary of $80,000.00. Tr. at 1443; GX 23 at 16-21 and RX 86. The LCA, prepared by an attorney hired by Dr. Qadir, specified a rate of pay of $88,533.00, representing 95% of a prevailing wage rate of $93,192.00. Tr. at 1449-1450; GX 23 at 10. A friend who had learned of HealthIMPACT from the state health department in turn referred Dr. Qadir to HealthIMPACT for assistance in obtaining his J1 waiver. Tr. at 1443-1444; GX 23 at 25-26. His waiver was approved on May 20, 1999. GX 23A. His H-1B petition was approved on May 18, 1999, for the period from October 1, 1999 to May 1, 2002. GX 23 at 12. The delay in the beginning date of his H-1B visa occurred because he had missed the cap for fiscal year 1999. Tr. at 1461, 1462-1463. He paid $1500.00 to the recruiter, $3750.00 of the $7500.00 owed to HealthIMPACT for the J1 waiver, with the intention of paying the balance, and $3199.01 to his attorney for the H-1B visa. Tr. at 1445-1449; GX 23 at 22-24, 27-28. Although he is married with two children, it is his understanding that he paid the same amount to his attorney for his visa as his single friends, so that there was no extra payment for his family. Tr. at 1548. While he was awaiting his waiver and visa, he returned to Pakistan, from April to November 1999. Tr. at 1460.

Dr. Qadir returned to Tennessee on November 9, 1999, and called Dr. Kutty to ask when he could start working. Dr. Kutty told him he could not start work until he had his credentials. Tr. at 1465. He was short of money and requested an advance, but Dr. Kutty said "the company had expanded, and we don't have enough funds in the company to give advances to the doctors." Tr. at 1466. He was available for work beginning November 10, 1999. Tr. at 1467. He actually began work on March 7, 2000. Tr. at 1468. When he began work, there were no patients assigned to him. Tr. at 1471. In order to increase his patient load, he wrote articles for the local newspaper. Tr. at 1472. He went to the clinic every day. If there were no patients, he spent his time writing the newspaper articles, making a computer program for billing, teaching the program to the staff, writing admitting orders (protocols) for admitting children to the hospital, and preparing and giving lectures at the hospital and to daycare staff. Tr. at 1475-1479. Initially he was paid at an annual rate of $45,000. In October 2000, his pay rate increased to $60,000. Later, it went down again. Tr. at 1455-1456, 1498; GX 23C. A couple of times his checks were late, and one time the check bounced. Tr. at 1498. He earned a total of $38,086.52 in 2000, GX 23 at 31, and $7916.66 in 2001, GX 23E.

During the time he was employed at the Rogersville Main Street clinic, Dr. Qadir took three full days of vacation for religious observance. Tr. at 1483. Beginning in late August or September 2000, when there were enough Muslims available in the area to perform Friday prayers, he took long lunch hours on Fridays for prayer. Tr. at 1484-1485. He also took a day and some afternoons for continuing medical education, and two or three afternoons for family purposes. Tr. at 1487-1489. He always informed the office manager when he would be off. Tr. at 1490. He also spoke to Dr. and Mrs. Kutty about extended hours for prayers on Fridays. Tr. at 1490-1491.

In late 2000, Dr. Qadir attended two meetings at which Dr. Chintalapudi reported that the company was in financial trouble. The first, attended by five doctors, took place at Dr. Chintalapudi's house. The second, attended by eleven doctors from the various clinics operated by Dr. Kutty, took place in Tazewell. Tr. at 1509-1510, 1528-1529. Dr. Kutty visited the clinic with Mr. Hooli and denied the rumor of financial problems, saying he had taken care of it. Tr. at 1501-1502. At that time, Dr. Kutty seemed pleased with Dr. Qadir's work when told that Dr. Qadir was seeing eight to ten patients per day. Tr. at 1502. Dr. Kutty said nothing critical at that time. Tr. at 1503. In January 2001, without advance warning, Mr. Hooli gave Dr. Qadir a reduced check, *see* GX 23C, saying that everybody's check was reduced because the company did not have enough funds. After receiving the reduced checks, several of the doctors consulted an attorney. Tr. at 1511. Dr. Qadir called Dr. Kutty to complain. Tr. at 1504. Dr. Kutty apologized, saying he was sorry that Dr. Qadir was "caught in the middle" and that he had been told Dr. Qadir took three days off without letting anyone know. Dr. Kutty confirmed to Dr. Qadir that he knew it was not true, and said he would be compensated in the next paycheck. Tr. at 1505-1506. When the next paycheck came, however, Dr. Qadir was compensated only at the $45,000 rate. Tr. at 1507. When Dr. Qadir again complained to Dr. Kutty, he received an additional check which brought the total to the $60,000 rate. Tr. at 1508. On February 14, 2001, the attorney sent Dr. Kutty the letter demanding that he pay eight of the doctors, including Dr. Qadir, in accordance with the LCAs filed with the Department of Labor. Tr. at 1512; GX 33.

Thereafter, Dr. Qadir did not receive his paychecks due February 20, March 5 or March 20. Tr. at 1513. He did receive a final paycheck dated April 5, 2001. GX 23E.

Dr. Qadir was terminated from employment on March 21, 2001. By the time he was terminated, he was averaging 18-20 patients per day. Tr. at 1479. He thought his practice picked up by November or December because another practice dropped all their TennCare/BlueCare patients. Tr. at 1519. When he counted in December or January, he had about 350 total patients, and thought by the time he left, he had 450. Tr. at 1480. In addition to being available at the clinic, he performed hospital rounds once or twice a day and assisted in the emergency room. Tr. at 1481-1482. There were only two pediatricians in the county. Tr. at 1482. According to his own calculations, by the time he was terminated, he was seeing enough patients to pay the salary he was receiving. Tr. at 1520-1521. His termination letter from Dr. Kutty stated,

> The company has reviewed the re-imbursement from your professional services for the last six months and it is no longer feasible for Maya Health Care to retain your services. Your services are terminated effective immediately.

GX 23F. On cross examination, Dr. Qadir agreed that the TennCare program was slow in reimbursing doctors, that overhead was an additional factor above salary to consider in the finances of a clinic, and that he would not expect a pediatrics practice to break even until the second year. He also said he thought Dr. Kutty mismanaged the billing. Tr. at 1532-1537.

With the assistance of counsel, Dr. Qadir filed a complaint with the Department of Labor. Tr. at 1515; GX 23 at 5-8; GX 28. He gave a statement during the investigation which was written down by an investigator; Dr. Qadir then read and signed it. Tr. at 1515; GX 29L. He corrected some errors in dates in the statement during his testimony. Tr. at 1516. At the time he testified (June 20, 2001), he had begun employment with HealthStar Physicians in Rogersville. Tr. at 1545. A copy of his new employment agreement was admitted into evidence under seal as confidential trade secrets, commercial or financial information, marked GX 62. Tr. at 1546-1548.

C. The Tazewell Clinic

The Tazewell clinic officially opened on February 17, 2000. Tr. at 128. Drs. Venkatesh, Speil, Chicos (all internists) and Naseem (a cardiologist) were employed there at the beginning. Tr. at 2247. A pediatrician, Dr. Khan, came from the Maynardville clinic once a week on Wednesday afternoons. Tr. at 819-820, 1278, 22472248. Two nurses, Lisa Cole and Cathy [last name unknown] were employed at first. Cathy left after a couple of months and was replaced by Angelia Hensley, who was eventually promoted to be the office manager in September 2000. Tr. at 1282. Later other employees were hired, including LPN Carolyn Noah and receptionists Susan Aicuff and Melanie Johnston. Tr. at 1144, 1307.

Initially the hours of the clinic were from 8:00 a.m. to 8:00 p.m. on weekdays, and 9:00 a.m. to 12:00 p.m. on Saturdays. Because they did not have patients, the hours were reduced,

first to 6:00 p.m., and then to 5:00 p.m., with a lunch break. Tr. at 133, 1142-1143, 1279, 1553. Paychecks were issued twice a month on the 5th and the 20th. Initially, billing for services was handled in Florida. The doctors would complete a "super bill" documenting the type of visit, the diagnosis and any procedures performed. *See, e.g.,* RX 60. Reports were faxed to Florida daily, and super bills mailed at the end of the week. Tr. at 136-137, 1286, 1558. Due to a large number of errors, the billing function was moved to Tazewell in January 2001. Tr. at 137. Payments went to the main Florida office. Tr. at 137-138. A daily appointment book was kept at the front desk which showed patients who called in for appointments. Tr. at 1211, 1904; RX 4. It did not show last minute callers, walk-ins or hospital and nursing home inpatients. Tr. at 1212, 1283-1284, 1904, 2279-2281. About half of the patients were walk-ins. Tr. at 1564, 2281. Nor did it reflect other matters such as reading test results or emergency room work. Tr. at 1212-1213, 2281. Daily journals would be the most accurate record of patients seen in the clinic. Tr. at 1284, 1555, 2283. Patients' names were entered from the sign-in sheets, RX 83A. The journal also showed the type of insurance, billing code, total amount to be charged and co-pays. Tr. at 1296, 1907.

Three additional doctors were recruited for the Tazewell clinic. One, Dr. Radulescu, never started work. Dr. Casis started at the beginning of February 2001. The third, Dr. Kanagasegar, began work on March 16, 2001. One week later, Drs. Chicos and Speil were fired, and Drs. Venkatesh and Naseem resigned.

1. Dr. Vivek Venkatesh

Dr. Venkatesh obtained his medical degree in India in 1992. Tr. at 2205. He did one year of internship, and then took a licensure examination in order to qualify for a residency in the United States. Tr. at 2206. He did a residency in internal medicine in New York from July 1995 to June 1998, and became board-certified in internal medicine. Tr. at 2207. During his third year of residency, he began looking for employment in an underserved area to obtain a J1 waiver. Tr. at 2208. He learned about Dr. Kutty through a friend of his father-in-law's, contacted him in January 1998, and was offered a position after being interviewed in Florida. Tr. at 2209.

On January 13, 1998, Dr. Venkatesh entered into an employment agreement to work in Bolivar, Tennessee, for $80,000.00 per year payable semi-monthly, Tr. at 2212, 2215; GX 27 at 22-26b, 27-28. After he returned to New York, Dr. Venkatesh was contracted by Ms. Sarmov, who told him that Dr. Kutty had instructed that the doctors should use HealthIMPACT America to process their J1 waivers. Tr. at 2213-2214. Dr. Venkatesh retained HealthIMPACT America to assist him in obtaining his J1 waiver. Tr. at 2214, 2216; GX 68. The initial waiver application filed for Dr. Venkatesh was rejected, because Bolivar was not in an underserved area. Tr. at 2218. HealthIMPACT referred Dr. Venkatesh to an attorney to apply for his H-1B visa. Tr. at 2221; GX 27 at 32. His H-1B application was rejected also; he was told that there was a problem with the LCA. Tr. at 2221. Subsequently he fired that attorney and retained another. Tr. at 2222.

On April 9, 1998, Dr. Venkatesh and Dr. Kutty executed an Addendum to the

employment agreement which added a liquidated damage clause providing for a payment of $200,000.00 to Dr. Kutty if Dr. Venkatesh prematurely terminated the agreement before the expiration of three years. GX 27 at 26c. Another Addendum to the employment agreement, changing the location of the clinic where Dr. Venkatesh would work to Tazewell, was executed on July 8, 1998. GX 27 at 26d and 34. A final Addendum changing the salary from $80,000.00 to $84,520.00 was executed on November 17, 1998, because of a discrepancy between the contract salary and the prevailing wage for the region. Tr. at 2224, 2240; GX 27 at 26e; GX 72. The LCA dated December 3, 1998, listed the rate of pay as $84,520.00, and the prevailing wage as $84,515.00. GX 27 at 38.[24] His H-1B visa was approved on March 25, 1999, for the period from March 24, 1999 to January 31, 2002. GX 27 at 18. Dr. Venkatesh paid HealthIMPACT $6000.00 for his first J1 waiver application for the Bolivar location, which was rejected by the State 20 program. He paid $4000.00 for the second J1 waiver application. He paid his first attorney $750.00, and his second attorney $6158.00 in fees and costs for his H-1B visa. Tr. at 2216, 2218, 2222, 2224; GX 27 at 29-32. He thought a small portion of the fee he paid to the second attorney, maybe 5-10%, was for his wife's H4 visa. His son, who was born later in the United States, does not need a visa. Tr. at 2223.

In July of 1998, when he completed his residency, Dr. Venkatesh and his wife had moved to Oklahoma to live with his brother, to save expenses. Tr. at 2226. He had no income, and was meeting his expenses by borrowing from family members or credit cards. Tr. at 2231. Once his H-1B visa was approved in March 1999, he kept calling Ms. Sarmov and Dr. Kutty to inquire about when he could start work. Tr. at 2225-2226. He moved to Tazewell in June 1999, because he was asked to cover for Dr. Gupta at the Maynardville clinic for two weeks while she took her vacation. Tr. at 2228-2229. He covered for Dr. Gupta from July 1 to July 15, for which he was paid $961.00. He had been expecting to be paid at a rate commensurate with the $80,000 annual salary which was in his original employment agreement. When he complained that the payment was too little, he received an additional $1000.00. Tr. at 2230, 2231, 2288; GX 71 at 1. When he arrived in Tazewell, he discovered that the clinic had not been built. He was told he could not be paid until the clinic was up and running. Tr. at 2231. He could not function that way because of his expenses. He was told that he would have to work in the emergency room at the Claiborne County Hospital in order to be paid. Tr. at 2232, 2233.

On September 10, 1999, Dr. Kutty wrote to Dr. Venkatesh the following letter about "moonlighting" in the emergency room:

> Please be advised that the agreement our company has entered into with ECC is a temporary arrangement in order to facilitate your services until completion of the credentialing process. For your services at the ER you will be compensated on the base of $84,520, the salary agreed to under the employment agreement.

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[24]There is an LCA at p. 16 of GX 27 which does not pertain to Dr. Venkatesh. Tr. at 2301-2303.

Tr. at 2234-2235; GX 76. The contract was between ECC and the clinic. GX 10A. The clinic received $65 per hour for the doctors' services in the emergency room. Payments were sent to Florida. Dr. Venkatesh never received any income directly from the emergency room. Tr. at 2233-2234; GX 10A; GX 77 at 1. A record of the hours he worked in the emergency room which Dr. Venkatesh obtained from ECC was entered into the record as GX 77. For the six months before he started working at the clinic, Dr. Venkatesh averaged 99 hours per month at the emergency room. For the one year period from February 2000, when he started to work at the clinic, through January 2001, Dr. Venkatesh worked an average of 76 hours per month at the emergency room.

Dr. Venkatesh received a total of $31,218.14 for his work in 1999, Tr. at 2240, GX 70, all of which was in the emergency room except the two weeks he covered for Dr. Gupta in Maynardville. Construction on the Tazewell clinic began around August 1999 and was completed in the first week of February 2000. Tr. at 2236. Dr. Venkatesh began working there the day it opened, February 17. Dr. Kutty and Mrs. Kutty agreed that his work in the emergency room would count towards his requirement to work at the clinic. His emergency work brought quite a few referrals of patients to the clinic. Tr. a t 2238. He had about 30 patients already when the clinic opened. Tr. at 2246. Dr. Speil, Dr. Chicos and Dr. Naseem were also in the clinic for the first few days, but then Dr. Kutty instructed them not to start until March 1. Tr. at 2246-2247. Dr. Venkatesh testified that once the clinic opened, he always devoted 40 hours per week to the practice. Tr. at 2249-2250. In addition to seeing patients at the clinic, Dr. Venkatesh had patients admitted to the hospital. Tr. at 2248-2249. By the time he left the clinic in March 2001, he had about 300 patients. Tr. at 2249. When he was not seeing patients at the clinic, he would review medical journals, take care of lab work, follow up with patients on their lab work or X-rays, check on patients in the hospital, and read electrocardiograms ("EKG") and Holter monitors. Tr. at 2250. Eventually he handed over the EKGs and Holter monitor readings to Dr. Naseem, the cardiologist. Tr. at 2251.

Dr. Venkatesh's paycheck for the period ending March 15, 2000, was less than he had been receiving, based on an annual salary of $80,000, instead of $84,520. Tr. at 2251. Dr. Venkatesh wrote to Ellie Hollis in Hudson to request that the amount be corrected for the next paycheck. GX 27 at 36. Ms. Hollis wrote back that that was the amount she had been instructed to pay by Dr. Kutty. His checks continued at the lesser amount after that. Dr. Venkatesh did not have any conversation with Dr. Kutty about that. Tr. at 2252.

Toward the end of 2000, Dr. Chintalapudi called a meeting for all of the doctors to be held in Tazewell, because it was in the center. Tr. at 2263. Dr. Chintalapudi spoke about his concerns about the finances of the company, which he had heard was not doing well. He said there was a possibility of bankruptcy and advised the doctors to start looking for another job. Tr. at 2264. Sometime later, Dr. Venkatesh started looking for another primary care position within Tennessee and looking in medical journals. He interviewed with two groups in Tennessee, Healthstar Group and Cherokee Health Systems, and another in Princeton, Indiana. Tr. at 2265.

Dr. Venkatesh's total earnings for 2000 were $77,419.91. GX 27 at 35. The paychecks

due on January 5, 2001, for December 15-31, 2000, did not arrive. The doctors tried to call Dr. Kutty and Mrs. Kutty at home and the office without success. Finally the doctors in Tazewell had a conference call with Ms. Hollis, the accountant. She said she "thought the problem was taken care of, and she said Dr. Kutty would call us back to let us know about the status of our salary." Tr. at 2253. Despite repeated calls, however, they were never able to reach Dr. Kutty. Tr. at 2254.

Mr. Hooli came by the Tazewell office on January 8. Tr. at 2254. Mr. Hooli told them that "the company's not making enough money and they couldn't afford to pay all the doctors." Mr. Hooli also said that

> . . . Dr. Kutty had come up with a plan whereby I would be paid at the rate of $40 an hour for the hours that I worked in the ER for the second half of December, and I was made to understand it's either that or nothing at all.
>
> So, he dictated and made me write a letter, which I subsequently wrote and signed, and it was faxed to Dr. Kutty on the 8th of January . . .

Tr. at 2255. The handwritten note stated:

> Re: – Paycheck 12/15-12/31 (not received to date)
>
> Please note the number of hours worked in ER from 12/15-12/31: 49. The corporation receives $65/h, as discussed with you, you said that Dr. Kutty will pay $40/h, amounting to $1960, add $250 bonus totaling $2210.
>
> . . .
>
> P.S. Mr. Hooli, please ask Dr. Kutty to send check for last year from 12/15-12/31 per prior rate, and we can work on a new arrangement from 1/01.

GX 74. Sometime later, Dr. Venkatesh received a check in the gross amount of $2210.00 for the end of December. Tr. at 2259, 2289; GX 71 at 2. On January 20, 2001, he received a check for $1666.66, based on a $40,000 salary, half of what he had been receiving. Tr. at 2259-2260, 2289-2290; *compare* GX 71 at 3 with GX 71 at 2. Asked what he did about that, Dr. Venkatesh said:

> Well, I continued to ask Mr. Hooli who would be present in the office usually in the morning . . . between eight and nine . . . why we are not getting paid our full amount. He continued to say that business was not picking up and he said that the company couldn't afford to pay the doctors.
>
> He said that there were too many doctors, and if it was up to him, he would get rid of a few of the doctors so that the business . . . could pick up with the number of doctors

that was left behind.

Q[uestion] Did he identify any particular doctors that he would get rid of?

A[nswer] He did not mention that, but he did say that Dr. Kutty hated Romanians.

Q Okay. And what else did he say if anything, about the problem with your paycheck?

A I asked him . . . people are unhappy because they are not getting paid. What if someone complained to an interested agency saying that they are not being paid, the INS or the labor department.

That's when he told me that Dr. Kutty is a U.S. citizen and he can['t] be touched and that he's a crook and if we were to report him to any of the departments that they would get us deported on account of misconduct.

Q Okay. And what did you – did you respond to that statement?

A Well, I was scared. If I did complain to an agency that . . . potentially he may deport me.

Tr. at 2260-2261. The difference in the checks he received in January was never made up. Tr. at 2262. His next check, on February 5, was for $3333, again at the $80,000 rate. Tr. at 2262-2263; GX 71 at 2.

At the end of January, eight of the doctors retained counsel. On February 14, 2001, the attorney sent a letter demanding that wages for the eight doctors he represented be paid in full at the rate of $115,000.00. Tr. at 2266-2267; GX 33. On February 20, March 5, and March 20, the doctors did not receive their paychecks. Dr. Venkatesh continued to work full time at the clinic. Tr. at 2267-2268.

On February 23, 2001, Dr. Kutty wrote to Dr. Venkatesh:

You are in material breach of your contract with The Center For Internal Medicine & Pediatrics, Inc. You have failed to devote 40 hours per week to the practice and [sic] medicine on behalf of The Center For Internal Medicine and Pediatrics, Inc.

Consequently, we are exercising our rights under paragraph 15(b) of your Employment Contract. All salary payments to you are herby [sic] suspended pending a final determination of damages incurred by The center For Internal Medicine & Pediatrics, Inc. through arbitration in accordance with Tennessee Arbitration Code.

This letter is not to be constructed [sic] as a discharge notice. You are to continue as a

> medical doctor under the terms of your employment with The Center For Internal Medicine & Pediatrics, Inc.

GX 75 at 1. Dr. Venkatesh received the letter by fax that day. Tr. at 2269. He testified that the allegations made in the letter were not true. Tr. at 2270. He said that during the course of the year 2000, during contacts with Mrs. Kutty or the other administrator, Beverly Thompson, they were always complimented in their work, that "it was a new clinic and that they anticipated that it would take time and that . . . we were progressing satisfactorily." Neither Dr. Kutty, nor Mrs. Kutty, nor anyone representing Sumeru Health Care Group had ever complained that he was not fulfilling his contract. Tr. at 2277.

When he raised his concern about the letter with Mr. Hooli, Mr. Hooli "wasn't able to give me an explanation for this." Tr. at 2270. Dr. Venkatesh was surprised because Mr. Hooli had complimented him in January because he was working in the clinic and the emergency room, and "he thought I was one of the doctors that was generating income and should be paid." Tr. at 2271. A week or ten days before his last day at the clinic, Dr. Naseem called stating that Mr. Hooli wanted to meet with him (Dr. Naseem), and asked Dr. Venkatesh to go with him as a witness. Tr. at 2271-2272. At the meeting, Dr. Venkatesh asked Mr. Hooli about the "audit" which reportedly underlay the letter he had received from Dr. Kutty:

> . . . I asked him about the audit that he had conducted. I asked him, you never spent time in the clinic, when did you ever conduct an audit to be there enough time to conduct such an audit. He said there never was an audit or an investigation.
>
> So I asked him, well, it looks like this matter is going to court . . .
>
> . . .
>
> Dr. Kutty has stated in the letter that we have not been working for the clinic. So I said if the matter goes to court, what are you going to say in court. He said, if the matter goes to court, I'll have to lie for my friend.

Tr. at 2273-2274.

Dr. Venkatesh was aware that Dr. Speil and Dr. Chicos were terminated from employment at the clinic on March 21 when they received letters "stating that their services were no longer required and the company couldn't afford to maintain their services and they were being discharged effective immediately," which they showed to Dr. Venkatesh. Tr. at 2275. Dr. Venkatesh last worked at the Tazewell clinic on March 26, 2001. Tr. at 2276. His attorney wrote a letter advising Dr. Kutty that Dr. Venkatesh and Dr. Naseem considered that their employment agreements were in breach as a result of Dr. Kutty's actions. Attached to the letter was a proposed form letter to notify their patients (as well as those of Dr. Chicos and Dr. Speil) that they were leaving, explaining what they should do for future care if they wished to continue at the clinic, or change to a different provider. GX 27 at 8-10.

On April 5, 2001, Dr. Venkatesh received one last paycheck, in the gross amount of $1666.66, for the pay period ending March 30, bringing his total earnings for 2001 to $8876.65. Tr. at 2290; GX 44 at 9; GX 71 at 4.

With the assistance of counsel, Dr. Venkatesh filed a complaint with the Department of Labor. Tr. at 2284; GX 27 at 5-8. Dr. Venkatesh was interviewed by telephone during the investigation. Tr. at 22842285; GX 29P. Dr. Venkatesh made two minor corrections in the statement during his testimony. Tr. at 2285. Dr. Venkatesh also submitted a four-page letter during the investigation. GX 27 at 12-15.

On May 2, 2001, Dr. Venkatesh entered into a new employment agreement for employment by Cherokee Health Systems. A copy of the agreement was entered into the record under seal as RX 92. Tr. at 2455-2456. About a week before he testified (June 27, 2001), he began working in the emergency room for Dr. Rose in Tazewell. Tr. at 2458.

2. Dr. Christian Speil

Dr. Speil obtained his medical degree in 1994 and started a residency in internal medicine in Romania. Tr. at 1832-1833. He came to the United States on a J1 visa in June 1996 to do a residency in internal medicine in New York, which he completed on June 30, 1999. Tr. at 1833. He is board-certified in internal medicine. He began looking for a position in an underserved area about six months before he completed his residency. Tr. at 1834. He responded to advertisements in medical journals and sent letters to clinics in underserved areas. His friend Dr. Chicos put him in touch with Dr. Kutty, who was looking for an additional doctor. Tr. at 1835. He spoke to Ms. Sarmov and Dr. Kutty by phone, and was offered a position. Tr. at 1836. Dr. Speil signed an employment agreement effective March 17, 1999, to work at the Tazewell clinic for $80,000.00. Tr. at 1836-1838. GX 26 at 18-28. After signing the contract, Dr. Speil retained an attorney in New York. Tr. at 1837, 1838. In response to his attorney's request for the prevailing wage rate, the Tennessee Department of Employment Security responded with the amount of 115,357.00. GX 26 at 12. On August 2, 1999, Dr. Speil and Dr. Kutty executed an addendum to the employment agreement changing the street address of the clinic and increasing Dr. Speil's salary to $115,000.00. Tr. at 1838. GX 26 at 29. The LCA submitted to the Department of Labor reflected the higher figure. Tr. at 1839-1840; GX 26 at 10-11. Dr. Speil's attorney applied for both his J1 waiver, and his H-1B visa. Tr. at 1841. His H-1B petition was approved on November 4, 1999, for the period from November 4, 1999, to May 30, 2002. Tr. at 1840; GX 26 at 13. He paid his attorney a total of $4500.00 in fees, and $366.00 in expenses. Tr. at 1844-1849; GX 47; GX 51. His wife obtained an H-1B visa also, through another lawyer. He obtained his Tennessee medical license on November 19, 1999. Tr. at 1841.

Initially Dr. Kutty told Dr. Speil the Tazewell clinic would open about October 1, 1999. Tr. at 1850-1851. At a meeting with Dr. Kutty in Maynardville in July, attended by several other doctors, including Dr. Chintalapudi, Dr. Chico and Dr. Khan, the opening date was pushed back to November. Tr. at 1852. Dr. Chicos and Dr. Speil raised the issue of their salary, as Dr. Speil's attorney had told them the prevailing wage was substantially higher than the original

employment agreement provided. Dr. Kutty suggested that the New York attorney did not know the area, and that they should use Ms. Sarmov, his corporate attorney, in his stead. Tr. at 1855. They declined to change their attorney. Tr. at 1856-1857. After that, Dr. Kutty sent the Addendum to the employment agreement. Tr. at 1858.

Dr. Speil was available for work once he had his visa on November 4, 1999. Tr. at 1860. About a week after his H-1B visa was approved Dr. Speil called Dr. Kutty to discuss when he could start work. His medical license was expected at any time, because approval depended only on receipt of the visa. Dr. Kutty told him it would be a couple more months, and that he would need credentials from the insurance company before he could start working. Tr. at 1859. Over the fall and winter they had several more conversations. Tr. at 1860. Dr. Speil planned to move to Tazewell in December, but after being told by Dr. Kutty he would not be able to work until January, he decided to go to Romania in December. Tr. at 1861. He was concerned that he was supposed to have started work within 30 days after his H-1B visa was approved. Tr. at 1863. When he returned from Romania, he did not move to Tazewell right away, because it was clear from his conversations with Dr. Kutty and Dr. Venkatesh, who was already in Tazewell, that there was no work available for him yet, and once he moved, he would have to pay two rents, one for his wife in New York, and one in Tazewell for himself. Tr. at 1865-1865. His wife had a job, but they were not able to pay all their bills on her salary. They had to use their savings and credit cards. Tr. at 1932. He finally moved to Tazewell on January 19 or 20. Bad weather delayed construction so that the clinic was not yet ready to open by February 1 when Dr. Chicos arrived in Tazewell. Tr. at 1866-1867.

The clinic opened on February 17, 2000. Dr. Kutty and his wife attended the opening. Tr. at 1868. Dr. Speil began seeing patients immediately when the clinic opened, but was not on the payroll until March 1. Tr. at 1870-1871, 1875, 1876. His initial paychecks were for $1,666.66, representing a rate of $40,000 per year. Tr. at 1873; GX 26 at 33-34. Dr. Kutty had told him and Dr. Chicos that the checks would be low, because it was a new practice, and asked them to work in the emergency room to provide extra income for the company. Dr. Speil and Dr. Chicos were added to the contract with Emergency Coverage Corporation to provide emergency services, which already included Dr. Ilie, Dr. Ionescu and Dr. Venkatesh. Tr. at 1893; GX 10A. The doctors received checks for their work at the emergency room which were forwarded to Florida. Tr. at 1894. At the end of April, Dr. Speil was no longer able to work in the emergency room because he needed refresher courses in pediatrics and trauma. Dr. Kutty suggested that he could assist in the Sneedville clinic once it opened in stead of working in the emergency room. Tr. at 1895; GX 26 at 35. In May 2000, the checks increased to $2500.00, a rate of $60,000 per year. Tr. at 1874; GX 26 at 31-33. Dr. Speil earned a total of $44,166.64 in 2000. Tr. at 1843; GX 26 at 30. Dr. Kutty never increased Dr. Speil's salary to the $115,000 rate specified in the Addendum to his employment agreement. Tr. at 1875.

Because of his work in the emergency room, Dr. Venkatesh was the only doctor in the clinic who had established patients when the clinic opened. Tr. at 1878. Before the clinic opened, Dr. Venkatesh, Dr. Speil and Dr. Chicos would go to the building daily and shop for furniture, equipment and supplies. Tr. at 1880-1881. Once the clinic opened, Dr. Speil worked a

regular schedule at the clinic from the beginning, always maintaining a full time schedule of 40 hours or more per week until he left. Tr. at 1879. If there were no patients, he would read medical journals and help put the office together. Tr. at 1880, 1881. He had active privileges at the Claiborne County Hospital, and participated at the staff meetings. Tr. at 1891. The hospital had a nursing home attached to it. Tr. at 1890. After the Sneedville clinic opened in June, until November 2000, Dr. Speil went to Sneedville for an afternoon one or two days a week, three to five times a month, to assist Dr. Manole. Tr. at 1895, 1896, 1899; GX 26 at 35. He stopped going in November because Dr. Manole had received all his credentials by then, and there were not enough patients there to justify the trip. He also went to the nursing home in Maynardville for two to four hours, two or three times per month.[25] Tr. at 1898, 1899. If he had patients in the hospital, he would go there one to three times a day, depending on the number of patients, the nature of their problems, and whether there were new patients that day. Tr. at 1900. Based on his review of the daily journals, Dr. Speil plotted a graph showing the number of patients seen weekly at the Tazewell clinic between February and October 2000. From a low of 20 the first week, with ups and downs, the graph shows an overall increase to an average in the low 70's for the last eight weeks he recorded the information. Tr. at 1882-1889; GX 50. After October, he stopped keeping the graph because the patient number began to increase a lot faster, and they got even busier in January, so he saw no more need for the graph. Tr. at 1884-1885. In addition to seeing patients in the clinic, nursing home, and hospital, he did internal medicine consults in the hospital for surgical patients. Tr. at 1902-1903. In his deposition testimony, Dr. Kutty credited Dr. Speil with being the only doctor at the Tazewell clinic to be meeting his obligations to the clinic. GX 1 at 30, 34.

On January 4, 2001, the office manager, Angela Hensley was fired. Dr. Kutty accused her of covering up for the doctors. GX 1 at 233. Ms. Hensley testified at the hearing. She said that Mr. Hooli told her she was being used as an example to show the doctors that the company meant business. He told her he wanted her to write a letter stating that the doctors were not in the office to see patients, and if she did, she would be reinstated with a raise. Tr. at 1290. She refused because it was not true. Tr. at 1292. She reported Dr. Hooli's offer to Dr. Speil and Carolyn Noah when it happened, both of whom corroborated her testimony at the hearing. Tr. at 1557-1558, 1928.

The paychecks due to the doctors on January 5, 2001, for the second half of December, did not arrive on time. Tr. at 1908. The four doctors got together in a room and tried unsuccessfully to reach Mrs. Kutty. Tr. at 1909-1910. When they asked Mr. Hooli, who was frequently coming to the Tazewell office during that period, Mr. Hooli said they were losing money, and he was not sure they would ever get their paychecks. Tr. at 1910. On January 9, Dr. Speil received a check for $1924.00, instead of the $2500.00 he had been receiving. Tr. at 1911-1912. He understood from Mr. Hooli that the amount was based on partial billing records. Tr. at 1912. Everyone got a different amount than usual, though the basis for calculation was not the same. His next paycheck on January 20 was $1666.66. Tr. at 1913. He did not try to contact Dr.

[25]Sneedville and Maynardville are about 25 miles from Tazewell. Tr. at 1896, 1898.

Kutty at that point, because no one had been able to reach him, and Mr. Hooli had a different story every day. One day he would say he didn't know anything, he was just an employee like they were. Other days he would say that they were not seeing enough patients and should come up with a business proposition. Tr. at 1914. He talked to the other doctors, and they decided to talk to an attorney. Tr. at 1915. His next paycheck on February 5 was back to $2500.00. He received no more paychecks after that, but continued to work on a full time basis until he was terminated. Tr. at 1916. On February 14, 2001, the attorney sent a letter demanding that wages for the eight doctors he represented be paid in full at the rate of $115,000.00. GX 33.

On March 21, 2001, Dr. Speil received a faxed termination letter from Dr. Kutty which said,

> The company has reviewed the re-imbursement from your professional services for the last six months and it is no longer feasible for Maya Health Care to retain your services. Your services are terminated effective immediately.

Tr. at 1918; GX 26 at 27. He left the clinic when he received the letter, and came back the next morning to collect his belongings. Tr. at 1919. On April 5, 2001, he received a final check for $1250.00, representing one week of work, bringing his total for 2001 to $7,340.66. Tr. at 1919-1921; GX 48. Dr. Speil said Dr. Kutty never criticized his work at the clinic at any time during his employment, nor did Dr. Kutty ever complain that he was not putting in enough hours. Tr. at 1932-1933. One of Dr. Speil's patients, Annette Fonte, testified at the hearing. She credited Dr. Speil and Dr. Naseem with saving her life when they treated her for a previously wrongly diagnosed heart problem. Tr. at 2028. On March 23, 2001, she talked to Mr. Hooli to find out why Dr. Speil was gone from the clinic. Tr. at 2032; GX 62. He told her that the investors had decided the clinic was not a wise investment because they had been losing money, Tr. at 2034, and that "the doctors were not as great as [she] thought because they . . . had turned him in to the labor board." Tr. at 2035. She was so angry about losing good doctors, she called the newspaper and was interviewed on television. Tr. at 2036.

Dr. Speil was one of the eight doctors who filed the initial complaint with the Department of Labor with the assistance of counsel. Tr. at 1922-1923; GX 26 at 5-9. During the investigation, he gave a statement which was written down by an investigator, and then he read and signed it. Tr. at 1929-1931; GX 29O. He also wrote a letter to the investigator explaining about his work at Sneedville. Tr. at 1924; GX 26 at 35.

After the January 5 paycheck was late and he and the other doctors consulted an attorney, it was clear to Dr. Speil that he would have to try to find another job. Tr. at 1946. He sent out some resumes at the end of February. He looked out of state a lot because of the non-compete clause in his employment agreement. Tr. at 1947-1948. By the time he testified (June 22, 2001), he had obtained employment at Multispecialty Medical, PC, a new company operating out of the same facility where he had been working for Sumeru. Tr. at 1948. He signed a contract on May 9, and began work on May 16, 2001.

3. Dr. Alexandru Chicos

Dr. Chicos graduated from medical school in Romania in 1994. Tr. at 124. He came to the United States to study internal medicine. He trained for three years in New York. Tr. at 124-125. During his third year of residency, Dr. Chicos was seeking employment by responding to advertisements he saw in medical journals. In February 1999, he received a call from Dr. Kutty and Ms. Sarmov, in response to their receipt of Dr. Chicos' curriculum vitae. In March 1999, he signed an employment contract to work in Tazewell, Tennessee, for an annual salary of $80,000.00. Tr. at 125, 153; GX 13 at 18-22.

On July 22, 1999, in response to a request from a representative of Sumeru Health Care Group in Hudson, Florida, the Tennessee Department of Employment Security identified the prevailing wage rate for two physicians (Dr. Chicos and Dr. Spiel) to be employed in Tazewell, Tennessee, at $115,357.00. GX 13 at 10. On August 2, 1999, Dr. Kutty and Dr. Chicos executed an Addendum to Employment Agreement changing their salaries to $115,000.00. Tr. at 125-126; GX 13 at 23.

The LCA signed by Dr. Kutty on August 9, 1999, specified that there would be three H-1B physicians with a prevailing wage rate of $115,357.00, to be employed in Tazewell from October 1, 1999, to September 30, 2002. The application was certified on behalf of the Department of Labor on September 2, 1999. GX 13 at 8-9.

By notice dated September 22, 1999, the INS notified Dr. Chicos that his J1 waiver had been approved. GX 13 at 13-14. On December 14, 1999, Dr. Chicos received H-1B approval valid from December 14, 1999, to September 30, 2002. GX 13 at 11, 12. Dr. Chicos testified that he paid his immigration attorney a total of $4500.00, and $100 to $200 in fees in association with his J1 waiver and H-1B status. Tr. at 126. Based on a schedule of fees from his attorney with handwritten annotations, I find he paid $4700.00 in attorney fees and costs. *See* GX 13 at 29.

Dr. Chicos was available for work when his H-1B visa was approved. He still had to apply for his medical license and credentialing with insurance carriers in order for the company to collect money for his services. Before he started work, he was told his salary would be $60,000, and then $45,000. When he protested that these amounts were not in accordance with his contract, Dr. Kutty told him the clinic would not be generating income at the beginning, so that was the best they could do. Tr. at 128-129. Later he was told he could earn $80,000 per year if he worked in the emergency room, so he started to do extra work in the emergency room. Tr. at 129. The record contains check stubs from Emergency Coverage Corporation for the period from May 15, 2000, to January 15, 2001. GX 13 at 50-59. The stubs show that Dr. Chicos worked for the Emergency Room 80 hours or more per month in April, May and June 2000. Thereafter his hours gradually declined to about 40 hours per month.

He began work at the Tazewell Clinic on March 1, 2000. Tr. at 126. According to his W-2 , his total pay from the clinic in 2000 was $56,666.59. Tr. at 127; GX 13 at 41. He

testified that he received approximately $13,000 in 2001. Although copies of his check stubs were introduced into evidence, GX 13 at 42-49, the dates are generally illegible. His last pay stub, dated April 5, 2001, indicates that he had received a total of $8186.65 for 2001. GX 44 at 1. I conclude that the pay stub accurately reflects his total earnings for 2001.

In early January 2001, paychecks for Dr. Chicos and his colleagues failed to arrive. The doctors tried unsuccessfully to reach Dr. Kutty or his wife. They asked Mr. Hooli when they would be paid, but he said he did not know. When asked why they were not being paid, Mr. Hooli said it was because they were not generating money. Tr. at 129. From his discussions with Mr. Hooli, Dr. Chicos got the idea

> that our situation was very difficult because of our immigration complications, and that legal process is very expensive and very lengthy. And Immigration and Naturalization Service might be notified, and we might end up getting deported.

Tr. at 129-130. Several of the doctors then retained counsel, who sent the letter demanding that their wages be paid on February 14, 2001. Tr. at 130; GX 33. Dr. Chicos said that he was told by others that Dr. Kutty had said he would get them deported if they continued legal action. Tr. at 131. The H-1B employees' next step was to file a complaint with the Department of Labor. Thereafter Dr. Chicos continued working, but received no more paychecks except for a partial check for the week of March 15-21. Tr. at 128, 132, 142-143, 148-149. During the investigation by the Department of Labor, Dr. Chicos gave a statement, GX 29C, and provided a sample of the types of records maintained by the clinic, RX 51.

Dr. Kutty sent Dr. Chicos a letter dated February 27, 2001, which stated:

> We have conducted an extensive investigation of medical activity at the Tazwell [sic] facility. As a result of this investigation, we have determined that you have failed to devote forty hours per week to the practice of medicine as required by your contract with the Center for Internal Medicine and Pediatrics, Inc.
>
> Moreover, you reported that you had worked in the Sneedville office when in fact you had not been there. This constitutes an act of falsification of a report which is the basis for discharge under paragraph 10.05 of your contract.
>
> Although we could terminate this agreement immediately for excessive absenteeism under paragraph 10.12 or falsified reporting under 10.05 of the Employment Agreement, we have decided not to do so. Instead, we will begin withholding your salary for a sufficient period of time to reimburse the Center for your failure to comply with our agreement under paragraph 3 which requires that you devote 40 hours per week to the practice of Primary Care at (Internal Medicine). The Center for Internal Medicine and Pediatrics, located at 1725 Main Street, Tazwell, Claiborne County, Tennessee.

GX 32. According to his own estimates, including his work at the Tazewell Clinic and

Emergency Room, but excluding call time and nursing home work, Dr. Chicos worked between 40 and 60 hours per week. Tr. at 132-133. He said he never turned away a patient, and was always available. He would see patients at lunch or after 5:00 p.m. "We always tried to see as many patients as possible to make the business work and build up a practice." Tr. at 133, 190. By working in the Emergency Room, he was able to earn more money, and would get more patients by becoming better known. Tr. at 134. The checks for Emergency Room work done by himself and Dr. Venkatesh went to the company's account. Ibid. He worked occasional day shifts, from 8:00 a.m. to 6:00 p.m., but mostly 14-hour night and weekend shifts at the Emergency Room as an attending physician, and it was his understanding from Dr. Kutty that those hours counted toward his hours worked for the office. Tr. at 135, 147. With some exceptions, he generally did not take time off from the office for work he did in the Emergency Room. Tr. at 135, 136.

Dr. Chicos was terminated from employment on March 21, 2001. His termination letter stated,

> The company has reviewed the re-imbursement from your professional services for the last six months and it is no longer feasible for Maya Health Care to retain your services. Your services are terminated effective immediately.

GX 13 at 30. Dr. Chicos had never heard of Maya Health Care. Tr. at 143. At the time he testified (June 4, 2001), he was not working, but a new potential employer had filed an LCA on his behalf, and he hoped to start that week. Tr. at 148.

Dr. Chicos signed a statement for the Department of Labor during its investigation. GX 29C.

4. Dr. Shoaib Naseem

Dr. Naseem obtained his medical degree in Pakistan in 1987. Tr. at 1092-1093. He also did two years of residency in internal medicine in Pakistan before coming to the United States in 1990. Tr. at 1093-1094. Then he spent three years as a postdoctoral research fellow in molecular and cellular cardiology, and three years in an internal medicine residency in Virginia. Tr. at 1094-1095. He moved to Pennsylvania to complete a three-year fellowship in cardiology. Tr. at 1095-1096. He is board-certified in internal medicine and cardiology. Tr. at 1096-1097. He entered the U.S. on a J1 visa, but planned to stay in the United States, so he began sending his resume out on the internet in the hope of obtaining a position that would allow him to obtain a waiver of the requirement that he return to Pakistan for two years. Tr. at 1097-1098. He was approached by a recruiter who put him in touch with Dr. Kutty in about September 1998. Tr. at 1099-1100. He paid the recruiter $3000.00. GX 22 at 26. He met with Dr. Kutty in Maynardville, Tennessee. Tr. at 1101. He received a contract for employment in the mail a couple of weeks later. Tr. at 1102. He was reluctant at first to sign the agreement because he was hoping for a career in academics. Tr. at 1102-1103. He eventually signed the agreement, to provide primary care at the Tazewell clinic, for a salary of $80,000.00, effective on November

30, 1998, when Dr. Kutty told him that there were only two positions left in the State 20 program. Tr. at 1104; GX 22 at 18-25. The LCA listed a rate of pay and prevailing rate of $115,357.00. GX 22 at 14.

The recruiter referred him to HealthIMPACT to obtain his J1 waiver. Tr. at 1105; GX 22 at 32-38. Dr. Naseem paid HealthIMPACT $7000.00. Tr. at 1106; GX 22 at 26. He retained Ms. Sarmov to obtain his H-1B visa at the request of Dr. Kutty, who told him she could keep close tabs on what was happening in the office as she was also working as the corporate attorney. Tr. at 1109. Ms. Sarmov filed his H-1B application on September 20, 1999. Tr. at 1110; GX 22 at 16-17. It was approved on January 3, 2000, for the period from January 3, 2000, to September 30, 2002. GX 22 at 15. He paid Ms. Sarmov $3000.00 in connection with his H-1B application, and an additional $500.00 for his wife's visa. Tr. at 1116; GX 22 at 26. He was concerned about delays in the process of obtaining his H-1B visa, however, and retained another law firm to complete the process for him. Tr. at 1114, 1117; GX 22 at 28. He paid $2320.00 to the new law firm. GX 22 at 27.

While he was waiting for the job to start, he had no income and was supporting his family on savings and credit. He requested and received about $1000 from Dr. Kutty before he started working, which he thought was reflected on his W-2 for the year 2000. Tr. at 1120-1121. When Dr. Naseem spoke to Ms. Sarmov about when he could start work, she told him he would have to go through credentialing with the insurance plans first. Tr. at 1125. He filled out the forms that were sent from the Florida office for that purpose. Tr. at 1127. He reported for work and started seeing patients on March 7, 2000, although he was told his "official" start date was March 15. Tr. at 1128. The other doctors working there (Drs. Venkatesh, Chicos and Speil) were all specialists in internal medicine. Tr. at 1134. Dr. Naseem had no assigned patient load when he started. Tr. at 1135. The clinic had opened only two or three weeks before he started. Tr. at 1136. In order to attract patients, he prepared an advertisement, and he and the others participated in a health fair and attended Lions Club meetings. Tr. at 1135-1136. Initially they stressed the quality of care they could provide. Tr. at 1137. Later they started talking about having a noninvasive cardiac laboratory, including echocardiograms, electrocardiograms, and Holter monitors, an area in which he thought his training was better than the other internists in town. Tr. at 1138. He had very few patients coming into the clinic the first couple of months he was there. Tr. at 1140. He said even when things were slow, he was working 40 hours per week, and he had hospital privileges at the Claiborne County Hospital. Tr. at 1141, 1160. By midsummer his hospital inpatient consults had "improved significantly." Tr. at 1145. He also had consults at the clinic; he thought about 60% were inpatient, and 40% at the clinic. He also performed consultations on an emergency basis. Tr. at 1147. Over the year he worked at Tazewell, he estimated had about 50 emergency consultations, which could occur at any time day or night. Tr. at 1147-1148. By the time he left, about 70% of his practice was cardiology, and 30% internal medicine. Tr. at 1148.

Dr. Naseem engaged in various activities to help the practice. Tr. at 1150. He started a continuing medical education program, and met with physicians in person on an individual basis, asking for referrals. Tr. at 1151. He read echocardiograms, electrocardiograms and Holter

monitor studies at the hospital and in the clinic. Tr. at 1157, 1160. When his duties at the hospital caused patients to wait at the clinic, he reserved morning hours for inpatient care only, when other physicians were making their rounds and requesting consultations. Tr. at 1161-1163. To avoid conflicts in his schedule between clinic patients and follow-up for inpatient consultations, he reserved Mondays and Fridays to schedule the inpatient follow-ups, unless the clinic notified him that a clinic patient needed an urgent appointment. Tr. at 1164. Eventually his inpatient consults declined, because the physicians in the largest practice in town hired two additional doctors to attend to their inpatients. Tr. at 1164-1165. Over time his hospital visits increased in duration because of the complexity of disease of his patients. He continued to work 40 hours or more per week throughout the time that he worked for the Center. Tr. at 1166. As to vacations, he took a few days at the beginning to go to Mexico to get his passport stamped, and four days in September for a cardiology board review course. Tr. at 1167. He took a few days to take the cardiology boards, and a basic review course. Tr. at 1167-1168. A vacation sheet was filled out and faxed to Florida when he took time off. He attended Friday prayers on a few occasions in nearby towns, involving about 90 minutes for a round trip. Tr. at 1169-1170.

Initially, Dr. Naseem was paid at a rate of $60,000 per year. By January 2001, he was receiving salary at an $80,000 rate. Tr. at 1184. In the first week in January 2001, the doctors at the Tazewell clinic did not receive their paychecks for the second half of December 2000. Tr. at 1171. They called for Dr. Kutty in Hudson, Florida, to inquire about their paychecks, but were referred to Ellie Hollis, the company accountant. She told them "the situation was handled." Tr. at 1172-1173. She said that the checks were mailed to Mr. Hooli. Tr. at 1173. That day or the next, Mr. Hooli came to the office. He told them that they did not get their paychecks because they were not generating enough money. Tr. at 1175. He asked the internists to show how much they had billed in December. Dr. Naseem showed Mr. Hooli his log book of echocardiograms he had read. Subsequently they did receive their paychecks for January 5. Tr. at 1176. Dr. Naseem did not receive his January 20 paycheck on time, but did receive it after he spoke to Mr. Hooli. Tr. at 1178-1179. Mr. Hooli told him the company had not received billing for the echocardiograms Dr. Naseem had read, but eventually found the super bills for them sitting in a drawer in the office. Tr. at 1179. The super bills should have been sent to Florida, but had not been. Tr. at 1180. After the problems with the paychecks, the doctors contacted an attorney who wrote to Dr. Kutty on their behalf. Tr. at 1181-1183; GX 33. Dr. Naseem's total earnings from the Tazewell clinic were $55781.99 in 2000, GX 22 at 40, and $11,666.65 in 2001, GX 41. Tr. at 1216-1217.

Dr. Naseem was one of the eight doctors identified in Mr. Divine's February 14, 2001, letter to Dr. Kutty demanding payment of unpaid wages. GX 33. On February 22, 2001, Dr. Kutty faxed two letters to Dr. Naseem in which Dr. Kutty alleged that an investigation by Mr. Hooli had disclosed that Dr. Naseem only came to the clinic when paged, and spent the rest of his time at home or working for Claiborne Hospital as Patient Care Co-ordinator for $50,000 per year; that he was untruthful about problems with equipment; and that he left at 11:30 a.m. every Friday and did not return. Dr. Naseem was instructed to resign from the hospital employment, spend 40 hours at the clinic, and submit additional super bills, warned about J1 waiver and Medicare requirements, and threatened with legal action to recover damages and withholding

from his salary to reimburse the clinic. Tr. at 1184-1185; GX 39. Dr. Naseem denied the allegations made by Dr. Kutty, and testified that he never received the results of Mr. Hooli's "audit" as one of the letters stated he would. Tr. at 1189. He testified that it would not have been possible to carry out his practice by staying in the clinic for 40 hours. Tr. at 1190. Dr. Naseem testified that at lunch in late February or early March also attended by Dr. Venkatesh, "Mr. Hooli said that it was very unfair the way we got the letters. Mr. Hooli said that there was no investigation done and if this thing goes to the court that he will have to lie for his friend." Tr. at 1210.

Another area of controversy between Dr. Naseem and Dr. Kutty was the equipment ordered so that Dr. Naseem could take echocardiograms and perform other cardiology tests in the office. Dr. Naseem testified that echocardiogram equipment was leased, but despite his efforts to make arrangements for a technician to operate it, the Florida office would not authorize the expenditure and told him they were interviewing technicians there. When he heard that he was being blamed for not using the equipment, he contracted for a technician, as the one promised from Florida never came. Tr. at 1191-1196. He rejected a machine intended for stress exercise tests acquired in July 2001 because it had no emergency shutoff. It was not replaced until November. Tr. at 1198-1200. A nuclear camera for perfusion tests could not be used on the upper floor because its weight made the floor shake. Construction was begun on the ground floor to accommodate all of the equipment for a full cardiology clinic, but it was not completed before he left Dr. Kutty's employ. Tr. at 1201-1206. Dr. Kutty and Mr. Hooli blamed Dr. Naseem for the problems with the cardiology clinic, claiming he was finding excuses for not using the equipment. Tr. at 2701, 2710, 2754; GX 1 at 28-29, 35. I find that the problems pointed out by Dr. Naseem were legitimate, and consistent with reports by the other doctors about problems they found with the management of the clinics from Florida.

Dr. Naseem last worked at the Tazewell clinic on March 26, 2001. Tr. at 1170. His attorney wrote a letter advising Dr. Kutty that Dr. Naseem and Dr. Venkatesh considered that their employment agreements were in breach as a result of Dr. Kutty's actions. GX 40. As of the day that he testified (June 19, 2001), he was not employed, but he had signed an employment agreement with Healthstar Physicians and hoped to start working July 1.

Dr. Naseem submitted a complaint to the Department of Labor dated February 26, 2001. Tr. at 1118; GX 22 at 5-13. During the investigation, he gave a statement which was written down by an investigator, and then he read and signed it. Tr. at 1187; GX 29K.

5. Dr. Ferdinand Casis

Dr. Casis obtained his medical degree in the Philippines in 1991, after which he did an internship and took board examinations for the Philippines and licensure in the United States. Tr. at 975. He came to the United States in December 1993, and obtained training in preliminary surgery in Chicago. Tr. at 976. From 1995 to 1998, he did an internal medicine residency, followed by a two-year endocrinology fellowship which he completed in June 2000. Tr. at 977. A patient he treated was from Tazewell, Tennessee, who told him there were no doctors there.

Tr. at 978. In March 1999, he received a letter from the Administrator of the Claiborne County Hospital and Nursing Home inviting him to explore employment opportunities in eastern Tennessee, which was "federally qualified as a medically underserved area." Tr. at 979-980; GX 12 at 35. The Administrator referred him to Sumeru in Florida. Tr. at 981. In the last week of September 1999, he received an employment agreement to work as a primary care doctor in Tazewell, Tennessee, in the mail from Ms. Sarmov, before he ever met Dr. Kutty or went to Florida or Tennessee. Tr. at 982-985. The employment agreement specified a salary of $80,000. GX 12 at 12. Dr. Casis signed the employment agreement and a retainer agreement with Ms. Sarmov. Tr. at 986; GX 12 at 22-25. He had a lawyer in Chicago look at the contract, but retained Ms. Sarmov to obtain his H-1B visa because she told him Dr. Kutty wanted his own lawyer to handle everything. Tr. at 989-990. HealthIMPACT contacted him to begin processing his J1 waiver. Tr. at 990. He inquired of the person at the Tennessee Department of Health in charge of the State 20 program for J1 waivers, who told him a slot had been reserved for him, and that HealthIMPACT had experience with the waivers in Tennessee, so he signed an Agreement with HealthIMPACT. Tr. at 991-992; GX 12 at 20. He paid $7000.00 to HealthIMPACT for his J1 waiver, and $4000.00 to Ms. Sarmov for his H-1B visa. Tr. at 994-995,1041,1043, 1057-1058, 1062, 1066; GX 12A. His H-1B visa was approved on September 1, 2000, for the period from October 1, 2000, to October 1, 2003. GX 12 at 6. The LCA stated a rate of pay and prevailing wage of $74,464 per year. GX 12 at 5.

Dr. Casis was in Chicago staying with relatives when his waiver and visa were approved, and called Dr. Kutty to find out when he could start. Tr. at 998. He had not been employed since he completed his fellowship in June 2000. Tr. at 999. Dr. Kutty did not want to let him work until he had his credentials with the insurance carriers so that he could see their patients. Tr. at 999-1000. He kept Dr. Kutty informed as the various approvals were received. Tr. at 1000-1001. He drove to Tazewell on February 4, 2001, after Dr. Kutty told him he could start on February 7. Tr. at 1001. He did not have a group of patients to care for when he started. Tr. at 1010-1011. When he was not busy, he would read or accompany other doctors to see their patients. He was at the clinic on a full time basis whether or not he had patients to see. Tr. at 1011. He also took hospital rounds. He spent a lot of time in Dr. Venkatesh's office because he felt comfortable there. Tr. at 1012. After Dr. Manole left the Sneedville clinic, Dr. Casis was asked to cover there in the afternoons. Tr. at 1004-1005.

Drs. Chicos and Speil were fired in mid-March of 2001, and Dr. Venkatesh and Naseem left about the last week of March. Tr. at 1014. Dr. Casis inherited their patients. Tr. at 1016-1017. On April 27, a court order which Dr. Casis understood to be a restraining order preventing anything being taken from the clinic was delivered to the nurses. Tr. at 1021, 1027. Dr. Casis last worked at the Tazewell clinic on May 11, 2001, when the clinic closed because the rent was not being paid. Tr. at 1013, 1017-1019. Some of the equipment was sold to the landlord, who was going to open another clinic there. Tr. at 1019, 1034. Karen Rey, who was in charge of payroll for Dr. Kutty, asked Dr. Casis for a resignation letter so she could give him his final paycheck, but he did not provide one because he did not resign. Tr. at 1022, 1024. He received his last paycheck on May 23. Tr. at 1025. Although Dr. Kutty suggested that Dr. Casis could continue to work for him in the Maynardville clinic, Dr. Casis declined because he did not want

to work for Dr. Kutty, because his employer-provided health insurance coverage had not been paid. Tr. at 1027-1028. Health insurance coverage was important to him because he is a divorced parent and he has his son with him. Tr. at 1028. In addition, Dr. Kutty would not tell him what the plan was for the clinic; the patient charts were taken from Tazewell to Rogersville around April 23, 2001. Tr. at 1029. At the time he testified (June 18, 2001), Dr. Casis had just signed a contract for employment with Gibson General Hospital in Princeton, Indiana, and expected to start work on July 2. Tr. at 1056, 1068-1069.

Dr. Casis was interviewed during the Department of Labor investigation. The investigator wrote out a statement for him, which he then read and signed. Tr. at 1030-1031; GX 29B. He testified to some corrections to the statement at the hearing. Tr. at 1031-1032.

6. Dr. Vlad Radulescu

Dr. Radulescu graduated from medical school in 1990, and did a residency in pediatrics in Romania until he came to the United States in 1994. Tr. at 1964-1965. He then undertook a residency and was chief resident in pediatrics, followed by a fellowship in pediatric hematology/oncology, all in New York. Tr. at 1965. He is board-certified in pediatrics, and board-eligible in pediatric hematology/oncology. Tr. at 1965-1966. His fellowship was to be completed in June 2000, and he began looking for a position in an underserved area to obtain a J1 waiver. GX 1966-1967. A friend introduced him to Dr. Kutty in May 1999. Tr. at 1967. He interviewed with Dr. Kutty in Florida, and was offered a position as a pediatrician in Tazewell. Tr. at 1967-1968.

Dr. Radulescu signed an employment agreement on September 22, 1999, for employment to begin on May 1, 2000, at the Tazewell clinic, for a salary of $80,000.00. Tr. at 1969; GX 24 at 17-23. Two LCAs were submitted on his behalf, possibly because he missed the cap on H-1B visas for fiscal year 2000. Tr. at 1978. Both LCAs specified a rate of pay and prevailing wage of $74,464.00, and a letter from Dr. Kutty to the INS in support of the H-1B petition also stated Dr. Radulescu would be paid $74,464.00. GX 24 at 5, 6, and 32. At Dr. Kutty's suggestion, he retained Ms. Sarmov to assist him with the process of obtaining the necessary approvals. Tr. at 1971; GX 24 at 26-28. He retained HealthIMPACT to obtain the J1 waiver at the suggestion of the Tennessee State 20 office. Tr. at 1972; GX 24 at 24-25. His J1 waiver was approved on August 22, 2000. Tr. at 1977; GX 24 at 7. He paid HealthIMPACT $7000.00 for obtaining the waiver, and $136.00 to the Department of State. Tr. at 1974, 2016, 2021; GX 24A. His H-1B visa was approved on August 25, 2000, for the period from October 1, 2000, to September 30, 2003. GX 24 at 10. He paid Ms. Sarmov $4000.00 for obtaining his H-1B visa, of which $500.00 may have been for his wife's H4 visa as a dependent. Tr. at 1976, 2016. He could not start work in Tazewell until October 1, 2000, when his H-1B visa took effect. Tr. at 1979.

His fellowship was at Mt. Sinai Hospital. When he completed his fellowship in June 2000, he continued working there as an instructor. Tr. at 1982. Dr. Radulescu was expecting to go to work in Tazewell as soon as he had his J1waiver, H-1B visa, Tennessee medical license and Drug Enforcement Agency number. Tr. at 1983. He went to Canada to get his visa stamped

into his passport on November 20, 2000. Tr. at 1983-1984; GX 24 at 29. When he returned, Dr. Kutty told him during a telephone conversation that he could not start working right away because his credentialing process was not complete, and was expected to take at least two months. Tr. at 1985-1987. Based on their discussion, Dr. Radulescu then expected that he would be able to start working about February 1. Tr. at 1986. They spoke again in mid-January, but his starting date was still vague. Tr. at 1987. He had submitted all the papers necessary to obtain his credentials to Ms. Seymour in Florida at the end of November when he obtained his Tennessee license. Tr. at 1987-1988. He moved to Tennessee from New York at the beginning of February, arriving in Tazewell on February 7. After additional conversations, Dr. Kutty told him he could start work on March 1. Tr. at 1988, 2005.

On February 13, 2001, Dr. Radulescu wrote to Dr. Kutty stating that he was "ready and eager to star practicing as a pediatrician . . . now." He recited the various credentials he had obtained, including a medical license, DEA certificate, admitting privileges at the county hospital, and a Medicare and Medicaid number, as well as pending applications with major HMOs expected to be approved in the near future. He closed, "I understand from our phone conversation from Feb 12th that you will let me start working on March 1st 2001." Tr. at 1989; GX 52. On February 21, 2001, he wrote to Dr. Kutty again about his preparations to start practice and supplies he needed, noting that he had been unable to reach Dr. Kutty or Mr. Hooli. Tr. at 1989-1990; GX 53. His follow-up letter seeking authorization to order the supplies was faxed to Dr. Kutty on February 23. Tr. at 1991; GX 54.

On February 27, 2001, Dr. Kutty faxed a letter to Dr. Radulescu in which he stated:

> Unfortunately, because of the restructuring which is currently taking place in our Tennessee medical offices, we will have to delay your employment until April 15, 2001. I know that these changes will result in a more efficient and viable healthcare organization in which to practice and develop professionally.

GX 55. This was Dr. Radulescu's first notice that he was not to start on March 1. Tr. at 1991-1992. The same letter was e-mailed to Dr. Radulescu on March 1. Dr. Radulescu replied via e-mail on March 2 that the delay was unacceptable and he would like to start working immediately. Dr. Kutty replied by e-mail that Dr. Radulescu's present credentials (lacking approval of the main insurance companies other than Medicaid and Medicare) were not sufficient due to problems collecting from the insurance companies in the past. Tr. at 1992-1993; GX 56. As April 15 approached, no preparations had been made for Dr. Radulescu to start his practice, such as advertising his presence or ordering supplies needed for a pediatric practice. Tr. at 1993-1994. On April 9, 2001, Dr. Radulescu again wrote to Dr. Kutty about preparations for starting practice on April 15, noting that he had been unable to reach Dr. Kutty by telephone. He stopped in at the office on April 10 to inquire whether they knew anything about him starting work. On April 11, Dr. Radulescu wrote again, having received the relayed message from someone at the office who called Florida on his behalf "that this is not good time for me to start and that I may be looking elsewhere for employment." Tr. at 1995; GX 58. He followed with a proposed agreement to release him from any obligation which was faxed to Dr. Kutty, stating:

> This agreement is made effective 4/16/01 between Sumeru Health Care Group LC d/b/a the Center for Internal Medicine and Pediatrics PC . . . (employer) and Vlad Calin Radulescu MD (employee).
>
> Both parties will consider our previous employment agreement null and void and neither party will seek to enforce any obligations derived from that contract or the attached covenants.

Dr. Kutty signed and returned the agreement. Tr. at 1996-1997; GX 59. Dr. Radulescu never went to work at the Tazewell clinic, and never received any wages or advances of salary from Dr. Kutty or Sumeru. Tr. at 1981, 1998-1999.

Dr. Radulescu's 2000 W-2 and some check stubs received from Mount Sinai hospital from 2000 and 2001 for his work as an instructor were introduced into evidence as GX 60. He intended to work for Dr. Kutty after his H-1B visa was approved, and given the opportunity, would have started on November 20. When Dr. Kutty gave him the February 1 start date, he resigned his employment at Mount Sinai effective January 31. Tr. at 2000, 2003-2005.

Dr. Radulescu was interviewed by telephone during the Department of Labor investigation. Tr. at 2001; GX 29M. He reviewed the statement in advance of the hearing and corrected some minor errors during his testimony. Tr. at 2002-2003.

At the time he testified (June 25, 2001), Dr. Radulescu was employed in Tazewell by Multispecialty Medical, PC along with Dr. Speil. He began working there on May 16, 2001. Tr. at 2009.

7. Dr Sivalingam Kanagasegar[26]

Dr. Kanagasegar obtained his medical degree in Sri Lanka in 1985. After three years of residency in Sri Lanka, Dr. Kanagasegar spent four years in the United Kingdom in an internal medicine residency. Tr. at 2145-2146. He also studied for a medical linguistics examination. Tr. at 2146-2147. He came to the United States for a residency in Connecticut for three more years, which he completed at the end of June 1998. Tr. at 2147. He then obtained a fellowship in rheumatology in Oklahoma, which he completed in June 2001. Tr. at 2148, 2169. Looking for a job in an underserved area to obtain a J1 waiver, he and a friend spoke to a recruiter who put him in touch with Dr. Kutty in January or February 2000. Tr. at 2149-2150. They spoke over the telephone several times, and Dr. Kutty offered Dr. Kanagasegar a position in Tazewell, Tennessee. Tr. at 2151-2152. He signed an employment agreement on February 7, 2000, for $80,000.00. Tr. at 2154; GX 18 at 9-17. The LCA specified a rate of pay and prevailing wage rate of $74,464 per year. GX 18 at 5. His recruiter referred him to HealthIMPACT to assist him with obtaining his J1 waiver, for which he paid $7000.00. Tr. at 2157-2158; GX 18D. He

[26]Dr. Kanagasegar is frequently referred to as "Dr. Segar" in the record.

retained Ms. Sarmov, who was working for Dr. Kutty, to obtain his H-1B visa.[27] Tr. at 2159-2161; GX 18C. He paid Ms. Sarmov $3500.00 in fees, and $400.80 in expenses, which included his wife's H4 visa. Tr. at 2161-2163; GX 18A, 18E. His H-1B visa was approved on August 22, 2000, for the period from October 1, 2000 to October 1, 2003. GX 18B. Between June 2000 and January 2001, he continued working in Oklahoma as a research assistant. Tr. at 2169. He felt he needed a break, and after a brief trip to Tazewell with his family, he went to India for two months, returning to Tazewell on March 8 or 9, 2001. Tr. at 2170-2172.

When he got back from India, the other doctors in Tazewell told him they had not been receiving their paychecks, and that they did not understand why. Tr. at 2184. Dr. Kanagasegar told Dr. Kutty that he had some financial trouble, and asked for some money. Dr. Kutty loaned him $2000.00. Tr. at 2184, 2189-2190; GX 18F at 1. Dr. Kutty did not tell him the clinic was in financial trouble. Tr. at 2185.

Dr. Kanagasegar began work at the Tazewell clinic on March 16, 2001. Dr. Kutty told him he might not be able to pay his full pay initially, but once he built up his practice he could catch up. Tr. at 2179. Drs. Naseem, Venkatesh, Chicos, Speil and Casis were all working there when he arrived. Dr. Khan came once on a Wednesday. Tr. at 2174. The other doctors worked for only one more week after he started. Tr. at 2177. The only one he knew before he came to Tazewell was Dr. Venkatesh, whose brother had also worked in Oklahoma. Tr. at 2175. He did not have much opportunity to get to know the others in the week they overlapped. Tr. at 2195. They did say that they had not been paid, that Dr. Kutty was not a good employer, and that he would have the same problem. Tr. at 2195-2196. He knew when Dr. Chicos and Dr. Speil were fired, but did not discuss it with them. Tr. at 2180. He did see their termination letters, GX 13A and 26A, because a person working in the office showed them to him. Tr. at 2186. He asked Dr. Kutty why they had been fired. Dr. Kutty told him there was some problem he could not disclose, "but if you are good, if you work good . . . you won't have any problem." Tr. at 2180-2181. He did not talk to Dr. Naseem and Dr. Venkatesh about why they quit, but they said they quit because they were not paid. Tr. at 2181, 2187. He was very curious and shocked, and called Dr. Kutty to ask what was going on. Tr. at 2181. Dr. Kutty apologized, but said he could not disclose everything, just "keep on doing whatever you are supposed to do, you'll be all right." Tr. at 2182, 2194. Later Dr. Kutty told him that he (Dr. Kutty) had "lost a lot of money" in Tennessee. Tr. at 2194-2195. Dr. Kanagasegar also asked Dr. Chintalapudi from the Maynardville clinic if he knew what was going on, but he said he did not. Tr. at 2200.

At the end of March, Dr. Kanagasegar started going to the Rogersville clinic because "all the doctors quit and the clinic was full of patients and nobody was there." Tr. at 2196. He was

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[27]On cross examination, counsel for Respondents suggested that based on the letter from Ms. Sarmov in which she stated, "I will be processing hour H1B petition through my private law office," that Ms. Sarmov was not acting in her capacity for Dr. Kutty's businesses. Tr. at 2201; GX 18C. Dr. Kanagasegar replied, ". . . I don't know. Dr. Kutty told me just to get this lawyer so he knows what she's doing." Tr. at 2202.

still working for Dr. Kutty at the Rogersville clinic at the time he testified (June 26, 2001). Tr. at 2140.

Dr. Kanagasegar's biweekly paychecks have always been for a gross amount of $3,333.33, representing an annual salary of $80,000.00. Tr. at 2190-2191, 2197; GX 18F at 2-4. He has also been reimbursed for mileage for travel. Tr. at 2191-2193; GX 18F at 2-5. So far, he has not had the same problem with his pay that the other doctors had. Tr. at 2196. Dr. Kutty had not said that he could not pay his salary. Dr. Kanagasegar said he told Dr. Kutty that he was working hard, so Dr. Kutty had to pay him. Tr. at 2197.

Dr. Kanagasegar was interviewed by an investigator, who wrote down his statement, which he read and signed. He made one correction to the statement during his testimony. Tr. at 2197-2198; GX 29G.

D. The Sneedville Clinic, Dr. Victor Manole

The Sneedville clinic opened on June 16, 2000. The office hours were from 8:00 a.m. to 5:00 p.m. Monday through Friday. Initially there was a one-hour lunch break from 12:00 to 1:00, but a few months later the doctors were told via a fax from Florida not to display the lunch hour. Tr. at 307. Billing of patients was handled by the Florida office. Tr. at 310. The clinic maintained an appointment book (*see* RX 3 and 6) and sign-in sheets for patients. Some patients were walk-ins who did not have appointments. Tr. at 587-588. The only doctor assigned to the Sneedville clinic full time was Dr. Manole.

Dr. Manole went to medical school in Bucharest, Romania, and completed his residency in internal medicine in New Jersey. GX 20 at 8. He was searching for a job when some Romanian colleagues recommended that he get in touch with Kalina Sarmov in Florida. Tr. at 294. He flew to Florida at his own expense for an interview. Tr. at 295. Ms. Sarmov charged him between $4300 and $4400, of which he paid $3700, to obtain his J1 waiver and his H-1B visa. After his interview, he was contacted by a representative of a company called HealthIMPACT America, who told him they had been in touch with Dr. Kutty and could assist with his papers through the State 20 program for a fee of $7,000.00, which fee he had not paid at the time he testified; he expected to pay on a schedule of installments. Tr. at 296-297. Dr. Kutty advised him that HealthIMPACT was a business partner and he should go through them. Tr. at 298. He signed an employment contract to work in the Sneedville clinic in the first week of June 1999 for $80,000.00. Tr. at 297, 300; GX 20 at 10-17. The LCA specified a rate of pay and prevailing wage of $115,357.00 per year, of which Dr. Manole was not aware until much later. Tr. at 297; GX 20 at 5.

According to the written statement Dr. Manole provided to the Department of Labor, Dr. Manole moved to Rogersville in September 1999. GX 29I at 2. In mid-January 2000, his J1 waiver was approved. Tr. at 424. He could not obtain his Tennessee medical license until he had a valid work visa. Tr. at 424-425. Application for the H-1B visa was received by the INS on February 23, 2000, but approval was delayed because the check to the INS bounced and had to be

replaced. GX 20 at 7. Dr. Manole was concerned that he would miss the quota of visas for that year, and have to wait until the next budget year beginning in October 2001. Tr. at 425, 430. Eventually, by notice dated April 13, 2000, he received approval for an H-1B visa valid from January 1, 2000, to January 1, 2003. GX 20 at 6.

Dr. Manole began working at the Sneedville clinic about June 1, 2000, two weeks before the clinic opened. Tr. at 301. He supervised the preparation of the building, obtained medical supplies, started the utilities and interviewed personnel. Tr. at 302-303, 588, 590-591. He interviewed and hired the staff. Tr. at 335, 372. Dr. Manole testified that after the clinic opened, he was there every day. His first check, which he received in the first week of July, was "short of half of what it was agreed." Tr. at 303. When he asked for an explanation, he was told that the group was expanding very fast, and that they would catch up. Tr. at 303-304. Dr. Kutty visited the clinic about every other month. At one point, Dr. Kutty became upset with Dr. Manole for being insistent about financial issues and told him that he was not in a position to ask so many questions, and could jeopardize his status. Tr. at 304. Dr. Manole's total earnings for 2000 were $19,999.92. GX 20 at 24. Toward the end of January 2001, Dr. Kutty threatened to send a letter to Immigration to jeopardize Dr. Manole's status, so he would be deported. Tr. at 305-306. On January 27, 2001, Dr. Manole wrote a resignation letter giving 30 days' notice. Tr. at 306, 591. He was worried about issues with the INS, the Department of Labor, patient billing, non-payment of utilities for the office and his health insurance. Tr. at 592-593. He received his last check the first week of February 2001. His total earnings for January and February 2001 were $3333.32. Tr. at 306-307; GX 20 at 22. At the time he left, Dr. Manole had 300-325 patients in his practice. Tr. at 307. He built up his patient list from nothing. Tr. at 308. He did not have emergency room work as there was no emergency room in the county. None of his patients were in a nursing home. Tr. at 308-309. Dr. Manole learned that his employee health insurance had been allowed to lapse by his employer when he was billed for his son's hospitalization for appendicitis. Tr. at 309-310. Eventually the insurer paid the customary charges for his son's procedures. Tr. at 371-372, 385-386.

On cross examination, Dr. Manole admitted he did not tell the Department of Labor investigators about checks he received before he started work at the clinic in June, including $1500.00 on March 23, and $1000.00 on April 20, May 15 and June 20, 2000, for a total of $4500.00. He said, "There is an issue, why did I receive that money from the company." Tr. at 326-327. When asked about those payments on redirect examination, he testified,

> . . . Starting with the month of April I spent a lot of time and effort with my wife making sure that the employer gets the best deal on the lease for the building in Sneedville, that we will have the basic medical supplies in the office and over the next couple of months, using my own car, at least five thousand, six thousand miles, going from medical group to medical group, medical office to medical offices to get the good bargain on exam tables and other medical supplies needed. And we thought that that is the reimbursement of all of those expenses, because we were almost bankrupt and we had to use our credit cards to make –

Tr. at 387. Dr. Manole later explained that he had no resources while he awaited approval of his H-1B visa. Tr. at 427. The check stubs for the payments, issued by The Center For Internal Medicine, Inc., with a Hudson, Florida, address, are marked as "loans." GX 35. When he started to receive the checks, he said:

> We started to receive the checks marked "loan." We wanted to – I wanted to know what's the meaning of "loan." There was no papers signed, agreed or anything like that.
>
> The lawyer told me,"Don't push too hard you may – you may upset the group or the director of the group." But I said, I have to do something. I have to have a roof and food for my children.
>
> The only comment I remember is, "Dr. Manole, that's all we can do for you now. Don't mention to anybody about these checks. Don't mention to anybody about the bounced check," and that's the history of the checks.

Tr. at 429. In a June 14, 2000, letter to Dr. Kutty, Dr. Manole documented some of the expenses he had incurred on behalf of the clinic for which he sought reimbursement. GX 36 at 36-37; Tr. at 574-575. The checks he had received marked "loan" were being spent for office expenses. Tr. at 576, 611. He and his family had "bills to pay, we were on crackers and canned food from the church, so it [the June 14 letter] was about distress." He never felt he had a "legal explanation" for the checks, but also thought that the checks may have been to cover the delay in his employment because of delay caused by the bounced check to the INS. He never repaid the $4500.00. Tr. at 605. He did receive some separate reimbursement for business expenses he incurred. Tr. at 611-612. The record is silent whether the $4500 was included in the total wages of $19,999.92 reported on his W-2 for the year 2000, GX 20 at 24. Respondents offered no explanation of the "loan" checks and have made no argument that they should affect any calculation of back wages due Dr. Manole. I have therefore disregarded them in my findings regarding back wages due to Dr. Manole.

Dr. Manole agreed that the calendar book in which appointments for the doctors at the Sneedville clinic were scheduled contained entries showing him out of the office several whole or partial days each month. Tr. at 341-356, 370; RX 3, 6. Nonetheless he maintained that he worked more than 40 hours per week. Tr. at 356. Sometimes he was gone to take care of office functioning, such as finding supplies. Tr. at 378. Receipts for equipment, supplies and gas he purchased between May and August 2000; records of continuing medical education and a Hancock County Health Council meeting he attended and a health fair he hosted at the clinic office; a vacation request for December 2000; and a request for sick leave in February 2001 after a car accident, were introduced into evidence in GX 36 and were discussed at length in his testimony. Tr. at 430-431, 433-492, 562-586, 608-610. Dr. Manole testified that he would also call the Florida office out of courtesy to let them know when he would be gone. Tr. at 378-379. He said he was asked by Mr. Hooli where he had been. He said he made house calls, put notes in the charts, and filled out super bills for those hours, but Mr. Hooli said they could not be found.

Tr. at 358. He agreed that his pay check was late in December, but denied that he was told it was because of non production. Tr. at 359, 361. He said Hooli visited in January "to help the business grow, and telling me, 'Dr. Manole, if you don't see the patients, you won't get the money.'" Ibid. He said he was worried about financial problems with the clinic because he learned that the utilities had not been paid. Tr. at 359-360. Dr. Manole had arranged for the utilities when the clinic opened, based on information he received from the Tazewell clinic, to be billed to Maya Health Care in Florida. Tr. at 588. When the electricity was going to be cut off, Dr. Manole referred the problem to the Florida office manager. Tr. at 589-590.

Dr. Manole resigned from the clinic , giving 30 days' notice on January 27, 2001. Tr. at 591. After he left the Sneedville clinic, Dr. Manole obtained employment with the Holston Medical Group, PC, in Kingston, Tennessee, which submitted a new H-1B application on his behalf. His pay included a signing bonus of $10,000.00 for which a check was issued on February 26, 2001. Tr. at 362-364, 596; RX 52. He actually began work at his new job on May 1, 2001. He was paid during the interim between February and May, when he learned the computer and saw some patients at an emergency center. Tr. at 598.

Dr. Manole signed a statement for the Department of Labor investigation. GX 29I.

E. The Rogersville Westside Clinic

The second Rogersville clinic opened for business on January 15, 2001, under the name "Westside Medical Center," staffed by Dr. Rohatgi, a cardiologist, and Dr. Haque, an internist. Tr. at 198; GX 25 at 35; GX 15 at 30-32. Freda Carmack was employed as an LPN, secretary, office manager combination. Office hours were from 8:00 a.m. to 5:00 p.m., Monday to Friday; the clinic closed for lunch from 12:00 to 1:00. Tr. at 1330. Initially superbills were sent to Florida to handle billing, but in February or March 2001, superbills were sent to the Tazewell office. Tr. at 927, 1332. Co-payments were deposited into a Sumeru Health Care Group bank account by both Rogersville clinics. Tr. at 1338. The clinic closed in March 2001, when Dr. Haque was let go, and Dr. Rohatgi and Ms. Carmack transferred to the Main Street clinic. On April 2, after Dr. Rohatgi quit, Ms. Carmack was terminated. Tr. at 1335.[28]

1. Dr. Rajesh Rohatgi

Dr. Rohatgi went to medical school and completed a residency in internal medicine and a fellowship in cardiology in India. He came to the United States in 1996, where he completed an

[28]Ms. Carmack testified at the hearing. Tr. at 1329 et seq. She said the doctors worked at the Westside clinic the same hours she did, performed hospital rounds in the morning, and evenings if needed, and attended board meetings at the hospital. She said they never turned away patients, and were always there when they were supposed to be. Tr. at 1331-1332. At one point she was told that the Florida office was three months behind paying the cleaning lady at the clinic. Tr. at 1334-1335.

internal medicine residency and a fellowship in nuclear radiology in New York. He was interviewed by Dr. Kutty after being referred by a recruiter. At the interview, Dr. Kutty offered him a contract for employment at $80,000 per year. Tr. 197, 256; GX 25 at 19-26. The LCA indicated that three primary care physicians would be hired at a rate of pay of $80,000, with a prevailing wage rate of $59,738.00. GX 25 at 10. The State of Tennessee Department of Health "reviewed the application [for a J-1 waiver] and finds it to be in the public's interest . . . in order that Dr. Rohatgi . . . may provide primary health care in an area which is medically underserved." GX 25 at 39. Dr. Rohatgi received his J1 waiver on April 5, 2000, GX 25 at 13, and his H-1B approval on June 20, 2000, for the period from June 20, 2000, to March 15, 2003. Tr. 197; GX 25 at 12. Dr. Rohatgi paid $7000.00 for his J1 waiver, $3000.00 for legal fees to obtain his H-1B visa, and $2500.00 for recruitment. Tr. at 201, 271-272; GX 25 at 27-31. Sumeru Health Care Group, Inc. reimbursed him $610.00 for H-1B fees. Tr. at 258; RX 20. His wife filed a separate H-1B visa application and paid fees separately. His son's H-4 visa was included in his H-1B. Tr. at 269. He became available for work on July 1, 2000, and began working on November 1, 2000. The date for starting work was delayed because the Rogersville clinic was a new office, which was not yet ready to open. When he started work, the office was not yet furnished. Tr. at 198.

After the clinic opened on January 15, 2001, he usually worked from 8:00 a.m. to 5:00 p.m. He covered for Drs. Ilie and Ionescu in their office for one week while they were away. He took a two week vacation himself. Tr. at 202. He was always at the clinic when he was supposed to be, and never turned away patients. Tr. at 202-203.

Dr. Rohatgi was paid $7500.00 in 2000, and $16,666.64 in 2001. Tr. at 199, 246; GX 44 at 7. He said some of his paychecks reflected the amount he was supposed to receive, and some did not. When he discussed this with Mr. Hooli, he was told his salary would be increased to what he was supposed to get. Tr. at 203. He was aware that some of the other doctors were not receiving what they were supposed to, and that once Dr. Kutty got a letter from them (the letter from Mr. Divine, GX 33, *see* Tr. at 211), Dr. Kutty stopped paying them. Tr. at 203-204. Mr. Divine wrote a letter on March 20, 2001, demanding that Drs. Rohatgi and Haque receive back wages owed to them. Tr. at 204, 212; GX 34. Mr. Divine also filed a complaint with the Department of Labor on his behalf. Tr. at 204; GX 25 at 4-9. Dr. Haque was fired the next day after the attorney sent the demand letter, one of seven doctors who were terminated. Tr. at 204-205. Dr. Rohatgi was told to go to the other Rogersville office to work because two other physicians were fired there. He continued working for another week. When he saw that everybody was either being fired or not paid, he "considered my employment, my employment contract as a material breach, so I have to leave." Tr. at 205. Dr. Rohatgi testified that Mr. Hooli "often said that we are running into financial loss and we may have to close down all these offices, and we may declare bankruptcy at some point of time." Tr. at 213-214. On cross examination about his reason for leaving he said, "I sent a letter saying, demanding my back wages and since it was not paid, yes, I left." Tr. at 257. His last date of employment was March 27, 2001. Tr. at 214.

Dr. Rohatgi started working at a new job on May 15, 2001. Tr. at 206. The LCA for his new employment by Gerital Geriatric Medical Ser. for the period from May 8, 2001, to May 8,

2004, was introduced as RX 35. Tr. at 275-276.

Dr. Rohatgi was interviewed by telephone during the Department of Labor investigation. *See* GX 29N.

2. Dr. Ahsanul Haque

Dr. Haque obtained his medical degree and underwent a residency in internal medicine in Pakistan, and then underwent an additional residency in New York beginning in 1994. Tr. at 921, 937; GX 15 at 31. Then he undertook a residency and fellowship in hematology and medical oncology, which he completed June 20, 2000. Tr. at 938. He was introduced to Dr. Kutty by a recruiter. He paid $1000.00 to the recruiter. Tr. at 910, 921. He went to Florida for an interview and entered into an Employment Agreement on April 29, 1999, to work in the Main Street Clinic in Rogersville for $80,000 per year. Tr. at 921; GX 15 at 20-27. Two LCAs were submitted on his behalf because the first was submitted after the cap had been reached for the year. Tr. at 918; RX 11 at 4. His LCAs specified a rate of pay and prevailing wage rate of $115,357, GX 15 at 11 and 40, as did the letter that Dr. Kutty wrote to the INS in support of his H-1B petitions, GX 15 at 30-33. The Tennessee Department of Health submitted a letter requesting approval of his J1 waiver under the State 20 program on October 22, 1999. GX 15 at 42. Dr. Kutty referred him to HealthIMPACT to seek a J1 waiver. Tr. at 923. He received notice of approval of his J1 waiver on March 2, 2000, with an amended notice issued March 6, 2000. GX 15 at 14, 15. He paid HealthIMPACT $4500.00. Tr. at 911. Dr. Kutty also introduced him to Ms. Sarmov as the general counsel of Sumeru Health Care Group. She filed his H-1B petition, GX 15 at 16-19, which was granted on August 23, 2000, and valid for the period from October 1, 2000, to October 1, 2003. Tr. at 922; GX 15 at 12. He paid Ms. Sarmov $1000.00. Tr. at 911-912, 922.

Although he had been hired to work at the Rogersville clinic on Main Street, there was no space for him there, so another clinic was leased about a mile away. He started work on November 1, 2000. Tr. at 923. During the period until the clinic opened in January, he and Dr. Rohatgi were arranging the office setup, furniture, medical supplies, stationery, and utilities, and interviewing staff. He worked for one week at the Main Street clinic while Drs. Ilie and Ionescu were on vacation. Tr. at 924- 925. Once the Westside clinic opened, he kept office hours from 8:00 a.m. to 5:00 p.m., with an hour for lunch. Tr. at 926-927. He said he was at the clinic when he was supposed to be, and never turned away patients. Tr. at 927. Initially he was paid at the rate of $60,000 ($2500 per bi-monthly pay period), then $80,000 ($3333.33 per pay period), then $40,000 ($1666.66 per pay period). Eventually the checks returned to the $80,000 level. Tr. at 929, 948; GX 15 at 34-37. He received a total of $7500.00 for the year 2000. Tr. at 930; GX 15 at 38. When he asked Mr. Hooli why he was being paid at a lesser rate than his contract, he was told "because you're just established and you are not making enough money . . . we can't afford that pay at [this] time, but later on we will increase your salary." Tr. at 930-931.

Mr. Divine wrote a letter dated March 20, 2001, demanding that Drs. Rohatgi and Haque receive back wages owed to them. Tr. at 204, 212, 931-932; GX 34. The letter was faxed to Dr.

Kutty about 9:00 a.m. on March 21, 2001. Tr. at 934, 949; GX 34 at 4-6. During a telephone conversation with Dr. Kutty, Dr. Haque was fired that same day. Tr. at 934. His termination letter dated March 21, 2001, signed by Dr. Kutty, stated:

> The total billing for your services for the last three months is $1990.00, since your salary per annum is $80,000, it is no longer feasible for Maya Health Care to retain your services.

GX 15 at 28; RX 11 at 1090. Mr. Divine also filed a complaint with the Department of Labor on his behalf. Tr. at 935; GX 15 at 5-10.

At the time he testified (June 8, 2001), he was not working, and no new employer had submitted an LCA on his behalf. During the time he was employed at the Rogersville Westside clinic, he did not work for any other employer. Tr. at 939.

Dr. Haque was interviewed by telephone during the Department of Labor investigation. *See* GX 29E. The record of the interview contained errors about the fees that he paid for recruiting and his H-1B visa, which he corrected during his testimony. Tr. at 910-911.

F. The Investigation by the Department of Labor

A complaint on behalf of eight of the doctors (Drs. Chicos, Ilie, Ionescu, Khan, Naseem, Qadir, Speil and Venkatesh) was filed with the Knoxville Area Office of the Wage and Hour Division of the Employment Standards Administration of the United States Department of Labor on February 28, 2001. Tr. at 2634; GX 28. The case was assigned to Daniel White and Robert Woodward for investigation. Tr. at 64, 67, 2635. The investigators interviewed witnesses and reviewed documents. Tr. at 67-68, 94-95, 2482, 2483-2487; GX 82. During the investigation, some documents the investigators sought, including payroll records, were not available. Tr. at 75. Portions of the investigative files compiled during the investigation were admitted as GX 11-29. The information obtained during the investigation and proposed penalties were summarized in letters of determination issued by Sandra Sanders, Assistant District Director of the Wage and Hour Division, on April 13, 2001. Tr. at 75, 2636-2637; GX 30.

Sandra Kibler, an investigator in the Tampa, Florida office of the Wage and Hour Division assisted in the investigation. On March 21, 2001, she visited the Hudson, Florida office to review records. Tr. at 2044, 2047; GX 64. Mrs. Kutty, Dr. Kutty and Mr. Hooli were present at the office. When she arrived, she was shown to an office with file cabinets, a desk and chairs, and manila legal-sized files on the floor and in a chair. When she asked "to see the public file, they said they had no knowledge of that, that this is what they had." Ms. Kibler started looking through the files, which "had lots of paper in them . . . more like a personnel file, not like an H-1B employee file . . ." Tr. at 2048. Had she not known some of the names provided by Mr. White, she "would have had no idea who was H-1B and who was not." Tr. at 2049. She did not see any posting of the LCAs as required by the Immigration and Naturalization Act, but noted that she was not in every room of the office. Tr. at 2049-2050, 2062. From the documentation

provided she could not determine pay rates or pay dates. She made copies of documents while she was there which she took with her and then forwarded to Mr. White. She did not remove any original documents. A clerical employee of Sumeru was in the room with her where she did the copying. Tr. at 2050.

Ms. Kibler was told that the reason the doctors were not paid in January and February was "because they were not doing what they were supposed to do, that the clinics were not producing enough that they would be able to pay the doctors." Tr. at 2051-2052. She responded that Respondents were obligated to pay the doctors. Tr. at 2052. Ms. Kibler testified as follows regarding further conversation she had with Dr. Kutty and Mr. Hooli:

> Q[uestion] Now, I earlier asked you about your conversations with Dr. Kutty while you were on site copying records. Did he ever say anything to you about firing employees?
>
> A[nswer] That is one of those things that was discussed.
>
> Q What did he say?
>
> A Well, he wanted to know why he had to pay people that were not doing what he thought they should be doing.
>
> Q And what did you respond about his obligation to pay them?
>
> A I said that when they are H-1B you have to pay them, even if it's a Fair Labor Standards Act case, you have to pay people who work for you. If they are not doing what you want to do, then you should exercise your duty of management and correct it.
>
> Q And what did he say then?
>
> A I don't remember he exact response, but it might have been also Mr. Hooli. I'm not sure which, because they were both talking a lot and, you know – but something to the effect, "Well, what am I supposed to do?" and I said, "Well, you know, you should have done what you should have done a long time ago, and if that means you have to terminate the relationship, you do so, but you don't – you can't do it now. It's too late."
>
> Q And what did you mean by that?
>
> A Because any termination at this point, once I'm already there, looking at their records, once they have already filed a complaint, is going to look like retaliation.
>
> Q Did you explain that to them?

A Yes.

Q Did you explain to them that as long as the employees – what did you tell them about their duty toward the employees as long as the employees were employed?

A They had to be paid. Even if they didn't have work to do, they have to be paid. That's part of the provisions of H-1B.

Tr. at 2065-2067, *see also* 2087.

The only file that appeared to contain all of the required documentation was Dr. Chintalapudi's file. Tr. at 2052. There were no payroll records available during her first visit except for some registers from 1999 and 2000 which were not sufficient for her "to determine who was paid what, when, where, how." Tr. at 2053.

Ms. Kibler returned to the Hudson office on Friday, March 23. Tr. at 2053. Before she had left on Wednesday, she had told them that she needed something that showed attendance and payrolls so she "would know who got paid what when." When she returned, she was provided "names and addresses, W-2 forms, pay registers, but they were more of the kind that you do at the end of a period that shows taxes removed and FICA, not gross wage or hours worked or anything like that." She took what was provided, and did not request further documentation from Dr. Kutty. Tr. at 2054. As Dr. Kutty had told her that his attorney probably had items he did not, at her request, he wrote to Ms. Sarmov requesting that she duplicate and supply any of the documents she had to Ms. Kibler by April 5. Tr. at 2055; GX 65. Ms. Sarmov responded by providing copies of what she identified as the immigration files of 13 doctors, including files pertaining to 7 of the 17 doctors involved in this case (Casis, Haque, Radulescu, Kanagasegar, Manole, Naseem and Munteanu) to Ms. Kibler. Tr. at 2056-2057; GX 66. Ms. Kibler never received any additional payroll records other than those she had received on March 23, nor did she receive "I-9" employee eligibility forms for any of the 17 doctors. Tr. at 2058. It was Ms. Kibler's understanding that at the time of the investigation, Ms. Sarmov no longer represented Dr. Kutty as in-house counsel. Tr. at 2065.

Mr. White calculated the back wages due during the investigation, and recalculated them during the hearing. His testimony regarding the back wage calculations is summarized below.

Sandra Sanders testified about the penalties assessed in the letters of determination. Her testimony is addressed below in the section on civil money penalties.

III. DISCUSSION

A. Respondents' Procedural Challenges

In their pre-hearing brief, Respondents alleged that this case is

> a "test case" where the DOL has unreasonably taken a legally and factually unsupported "kitchen sink" approach to simply overwhelm the Respondents. . . . The Respondents have been deprived of their Due Process rights by the DOL in its quest for a victory under the new implementing Regulations.

Respondents' Pre-Hearing Brief and Motions for Relief at 2. Respondents objected to the Administrator's use of discovery by Mr. Divine in private litigation in state court in its investigation and during proceedings at OALJ, including the deposition of Dr. Kutty "taken under false colors," Brief at 3, while the Respondents had little time for discovery. Respondents also alleged that DOL conducted a biased and unfair investigation. Respondents have offered no precedent in support of their "due process" arguments. In any event, I find no factual support for these allegations in the record before me. The Administrator is charged with investigating compliance with the Act by the statute and regulations. The scope of the investigation in this case was proportional to the complaint which generated it. Respondents have demonstrated no bias or impropriety in the methods employed by the Administrator in the investigation. The time constraints posed at least as much difficulty to the Administrator as to the Respondents. As Ms. Kibler observed, 30 days is a "very short time to make a lot of investigative queries for that many people," Tr. at 2092, and "[t]he facts [the investigators] are trying to find are the basis of [Respondents'] employment relationships and [Respondents'] records." Tr. at 2094.

Respondents complained that the time for preparation for the hearing was too short for a case of this size, but also complained that DOL had failed to meet the deadlines set forth in the Act and regulations. Pre-hearing brief at 12. The INA and implementing regulations contain several limitation periods in describing the intended progress of complaints before the Department of Labor. Determinations are supposed to be issued within 30 days after a complaint is filed; an opportunity for hearing is supposed to be provided within 60 days after the date of the determination; and a finding is supposed to be made not later than 60 days after the date of the hearing. 8 U.S.C. § 1182(n)(2)(B); 20 CFR §§ 655.805(d)(3), 655.835(c) and 655.840(a) (1995) and 20 CFR §§ 655.806(a)(3), 655.835(c) and 655.849(a) (2002). In this case, the Respondents repeatedly challenged the Administrator's failure to meet the deadlines in the statute and regulations, suggesting that failure to meet the time frames bars prosecution of the case, and that the Administrator is bound by the facts known during the initial investigation and remedies sought in the determination. *See* Tr. at 13-14, 231, 284, 784-785, 965-966, 974, 1059-1060, 1589-1590, 1974, 2094, 2236, 2354, 2423, 2505. Both arguments are without merit.

"Government agencies do not lose jurisdiction for failure to comply with statutory time limits unless the statute '*both* expressly requires an agency or public official to act within a particular time period *and* specifies a consequence for failure to comply with the provision.' " *See Brock v. Pierce County*, 476 U.S. 253, 259 (1986) (citations omitted) (holding that "the mere use of the word 'shall' in § 106(b) [of the Comprehensive Employment and Training Act], standing alone, is not enough to remove the Secretary's power to act after 120 days."). The INA does not specify consequences for the Secretary's failure to act within the deadlines. The time limitations, therefore, are directory rather than jurisdictional. *Administrator v. Alden Management Services, Inc.*, ARB Nos. 00-20 and 00-21, ALJ No. 1996-ARN-3, slip op. at 5

(ARB Aug. 30, 2002). Nor do the time limitations prohibit further development of the facts of the case through discovery after the initial investigation results in a determination. *See Administrator v. HCA Medical Center Hospital*, USDOL/OALJ Reporter (HTML), ARB No. 97-131, ALJ No. 1994-ARN-1 at 7-9 (ARB June 30, 1999) (Time frames for investigation in the Immigration Nursing Relief Act of 1989 did not bar discovery by Administrator as to whether the respondent failed to pay prevailing wages on remand from ARB).[29]

B. The Statute of Limitations

The INA contains a one-year statute of limitations for investigations by the Administrator:

> . . . No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. . . .

8 U.S.C. § 1182(n)(2)(A). Respondents argued in their pre-hearing brief at p. 11 that some of the claims by the Administrator fall outside the statute of limitations. They did not specify which claims. Mr. Divine's complaint was filed on February 28, 2001. Under the one-year limitation, the Administrator was authorized to investigate any "failure or misrepresentation" occurring on or after February 28, 2000. The only claim which arguably falls outside that window is the claim on behalf of Dr. Ahmed, who accepted other employment on January 22, 2000. Mr. White stopped her back wage calculation in January because of that fact. Tr. at 2576. Nonetheless, Respondents' obligation to her continued after that date, and after February 28, 2000. Dr. Kutty wrote to her on March 3, 2000, giving her 10 days to report to Dundee, Florida. GX 11L at 4. Approval of transfer of her H-1B visa to another employer did not occur until May 25, 2000. RX 59 at 30-31. Under these circumstances, I conclude that the claim on behalf of Dr. Ahmed is not barred by the statute of limitations.

To the extent that Respondents' argument was based on a theory that the one-year statute of limitations barred the recovery of backpay for any period before February 28, 2000, they were mistaken. The one-year statute of limitations does not operate as a limitation on the period for which back wages may be paid. 20 CFR § 655.806(d)(5) (1995) and 20 CFR § 655.806(a)(5) (2002). As the Administrative Review Board stated in a decision pertaining to the Immigration Nursing Relief Act of 1989 ("INRA"):

> At this point we hasten to hold that the question of what time limitation, if any, applies to calculating back pay awards . . . does not involve a discussion or analysis of statutes of limitation. . . .

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[29]This decision and any others cited to the USDOL/OALJ Reporter are published on the Department of Labor's World Wide Web site at www.oalj.dol.gov.

> . . . "Statute of limitations" is the term referring to statutes prescribing the time beyond which a plaintiff may not *bring a cause of action*; generally, a fixed time period within which a *lawsuit must be brought* after a cause of action accrues. . . . "The purpose of such statutes is to keep stale litigation out of the courts. They are aimed at *lawsuits*, not at the consideration of particular issues in lawsuits." . . .
>
> It is not unusual for federal statutes to impose different time limits for filing a complaint and for calculation back pay. For example, Title VII of the Civil Rights Act of 1964 requires that a charge be filed within one hundred eighty days after the alleged unlawful employment practice occurred, but back pay accrues for a period of two years prior to filing the charge. . . .

Administrator v. Alden Management Services, Inc., ARB Nos. 00-20 and 00-21, ALJ No. 1996-ARN-3, slip op. at 14 (ARB Aug. 30, 2002). The ARB went on to hold that the period for recovery of back pay is the maximum period a nonimmigrant nurse may be admitted on an H-1A visa, six years, based on the language of 8 U.S.C. § 1182(m)(4). Id. at 15. Restrictions on the admission of foreign medical graduates are found in 8 U.S.C. § 1182(j). That section imposes a limit of 7 years for medical students on J1 visas, but contains no time limit for medical graduates on H-1B visas. Applying the reasoning in *Alden Management*, however, I conclude that the doctors would be entitled to back pay for the entire period they were authorized to work under their H-1B visas.

C. Failure to Pay Required Wages

1. Required Wage Rates

The regulations provide detailed guidance regarding the determination, payment and documentation of the required wages. *See* 20 CFR § 655.731 (1995) and (2002). The regulations define the "required wage rate" which must be paid by the employer as the "higher" or "greater" of the "actual wage rate" which the employer pays other employees with similar qualifications and experience in the same location, or the "prevailing wage rate" for employees in the same occupation in the geographic area. 20 CFR §§ 655.715, 655.731(a) (1995) and (2002). The prevailing wage is determined as of the time of filing the LCA; the employer "is not required to use any specific methodology to determine the prevailing wage, and may utilize a S[tate] E[mployment] S[ecurity] A[gency], an independent authoritative source, or other legitimate sources of data." 20 CFR § 655.731(a)(2) (1995) and (2002). The regulations declare the SESA rate to be the most accurate and reliable, and provide that where the SESA or other specified rates are not available, the prevailing wage should be the "average" (now "weighted average") for workers employed in the geographic area where the H-1B worker is to be employed. 20 CFR § 731(a)(2)(iii) (1995) and (2002) and (b)(3)(iii)C(1) (1995), now (b)(3)(iii)(B)(1) (2002)). Certification of the LCA did not constitute approval of the wage rate the employer represented that it would pay. *See* 20 CFR § 655.740(c) (1995) and (2002). Applying the regulations to this case, the wage rates which should have been paid were the SESA rates, where available, or the "mean" non-SESA rate when the source relied on by Respondents gives a minimum, mean and

maximum. Tr. at 81-85, 2569; *see* GX 27A. Some of the LCAs signed by Dr. Kutty used the SESA rates, which Mr. White accepted for the purpose of the back wage calculations. Some of the LCAs used non-SESA rates. Where those reflected the minimum instead of the mean, the rate on the LCA was rejected, and Mr. White used the mean for the purpose of the back wage calculations. Tr. at 2573-2574, 2591, 2600-2601, 2605, 2612.

2. Benching

The INA as amended by the ACWIA makes it a violation of the Act

> (I) . . . for an employer . . . who places an H-1B nonimmigrant designated as a full-time employee . . . in nonproductive status due to a decision by the employer (based on factors such as lack of work) or due to the nonimmigrant's lack of a permit or license, to fail to pay the nonimmigrant full-time wages . . . for all such nonproductive time.
>
> . . .
>
> (III) . . . In the case of an H-1B nonimmigrant who has not yet entered into employment with an employer . . . [this provision] shall apply to the employer beginning 30 days after the date the nonimmigrant first is admitted into the United States pursuant to the petition, or 60 days after the date the nonimmigrant becomes eligible to work for the employer (in the case of a nonimmigrant who is present in the United States on the date of the approval of the petition).
>
> (IV) This clause does not apply to a failure to pay wages to an H-1B nonimmigrant for nonproductive time due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work.
>
> . . .

Section 413(a) of the ACWIA, 8 U.S.C. § 1182(n)(2)(C)(vii). All 17 doctors involved in this case were in the United States pursuing their post-graduate medical education when Respondents filed the LCAs at issue. All 17 were eligible to begin working for Respondents as soon as their H-1B visas were approved, or became effective. Under these provisions of the INA, Respondents were obligated to begin paying the doctors 60 days thereafter. Based on the plain language of the statute, lack of work, or lack of a Tennessee medical license or insurance credentials, did not relieve Respondents from that obligation. Only if a doctor was absent from work for non-work-related factors would Respondents be excused from payment of his or her salary.

Dr. Kutty took the position that he should not have been required to pay the doctors their full salary until they had all their credentials "so that we make sure that we are not letting loose an unqualified doctor on the community." Tr. at 2749. He did not think he should have to pay

the doctors before they could treat patients, because that was not in the contracts. GX 1 at 163. The language of the statute is clear, however, that the obligation to pay the doctors arose when their H-1B visas were approved, without regard to the status of their credentials. Even if they could not treat patients while they were awaiting their credentials, they should have been paid anyway.

3. Business Expenses

The 1994 regulations provided at 20 CFR § 655.731(c)(1) (1995) that in order to satisfy the required wage obligation,

> The required wage must be paid to the employee, cash in hand, free and clear, when due, *except that* deductions made in accordance with paragraph (c)(7) of this section may reduce the cash wage below the level of the required wage.[30]

Authorized deductions listed in old paragraph (c)(7) (now (c)(9)) excluded employer business expenses. According to old paragraph (c)(9) (now (c)(12)):

> Where the employer depresses the employee's wages below the required wage by imposing on the employee any of the employers business expense(s), the Department will consider the amount to be an unauthorized deduction from wages even if the matter is not shown in the employer's payroll records as a deduction.

Because the prohibition against charging employer expenses to the employee applies only if deducting the expenses reduces the salary below the required wage, *see* 65 Fed. Reg. at 80199 (2000), employer business expenses become part of the required wage calculation. As the Respondents paid the H-1B doctors less than the required wage rates, the employer's business expenses paid by the employees are at issue in this case. Respondents argue that an award of the full amount of wages plus business expenses exceeds the intent of the statute. Pre-hearing brief at 14. On the contrary, failure to add the fees the employer should have paid would reduce the back wage award to an amount less than the prevailing wage, the exact result the statutory language was meant to prevent.

The old regulation did not address whether the DOL would consider the costs associated with obtaining H-1B visas to be an employer business expense. The new regulations specifically provide that employer business expenses which may not be charged to H-1B employees include preparation and filing of the LCA and H-1B petition. 20 CFR § 655.731(c)(9)(iii)(C) (2002). This provision did not represent a change in DOL policy. Rather, in the Notice of Proposed Rule Making, it was included in an Appendix intended to explain DOL's interpretation of the previous regulation regarding employer business expenses, which was not open for notice and comment.

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[30]Except for a change in the number of the cross-referenced sub-section to (c)(9), the wording of the new regulation is the same.

In the final version of the rule, it was moved into the body of the regulations. 65 Fed. Reg. at 80198 (2000).

The Administrator has assessed fees paid by the H-1B employees for J1 waivers and H-1B visas as employer business expenses as part of the back wage awards. Respondents argued that they should not be held responsible for the attorney fees paid by the doctors to obtain their J1 waivers and the H-1B visas as Respondents had no control over them. They also argued that they should not be held liable for such fees, because even experienced immigration attorneys did not notify their clients that Respondents were responsible for paying those fees, suggesting a "good faith" defense. *See* the pre-hearing brief at 13-15; Tr. at 2817. Neither of these arguments finds any support in the statute or regulations.

It is arguable that the costs associated with obtaining J1 waivers, which are not addressed explicitly in the new regulations, should be treated differently than the costs associated with LCAs and H-1B visas, which are addressed in the new regulations. LCAs and applications for H-1B visas are submitted by the employer, and certifications and approvals are issued to the employer. *See, e.g.*, GX 11A at 2, 9-12. Approval of a J1waiver, on the other hand, is issued to the employee. *See, e.g.*, GX 11A at 4. Neither the new regulations, nor the commentary which accompanied them, address whether the costs of obtaining a J1 waiver are an employer's expense, or an employee's expense. As to employee expenses, the commentary to the new rules stated,

> . . . if an applicant for a job hired an attorney clearly to serve the employee's interest, to negotiate the terms of the employment contract, to provide information necessary for the H-1B petition or review its terms on the worker's behalf, or to provide the applicant with advice in connection with application of U.S. employment laws including the various employee protection provision of the H-1B program and its new whistleblower provisions, the fees for such attorney services are not the employer's business expense.

65 Fed. Reg. at 80200 (2000). The commentary appears to contemplate a situation in which the employee and the employer are separately represented during the application process, which is not what happened here. While it could be argued either way whether fees paid for obtaining J1 waivers were the employers' or the employees' expenses, I cannot say that including J1 waiver costs in the category of employer business expenses is unreasonable, as the J1 waiver must be obtained before an H-1B visa can be issued. I conclude that including J1 waiver fees and costs as employer expenses, as the Administrator has done in this case, is a reasonable interpretation of the law and the regulations, and within the Secretary's discretion.

In some cases, the attorneys hired by the doctors, in addition to preparing LCAs, H-1B petitions and J1 waiver applications, also helped negotiate the employment contracts or undertook other tasks which were clearly employee expenses as described in the commentary. Some of the doctors paid recruiters for referrals. Such expenses, which should be considered to be employee expenses, have not been charged to the Respondents in the award. There is no evidence in the record that the H-1B employees were charged separately for preparation of the

LCAs. Thus only fees and costs for obtaining J1 waivers and H-1B visas for the H-1B employees have been included in the back pay calculations as employer business expenses.

4. Respondents' Other Defenses to the Failure to Pay the Required Wages and the Award of Back Wages to the H-1B Employees

Respondents have not offered any legally cognizable defense for failing to pay the prevailing wage rates, or the wage rates set forth in the LCAs, from the date the H-1B doctors' employment should have started. The articulated reason for failing to pay the contract rates at the beginning of their employment was that the doctors could not bill enough in a new practice to cover their salaries. Nothing in the statute or regulations suggests that an employer is free to pay less than the prevailing wage rate while a new business is establishing itself.

Respondents alleged that some of the doctors were paid less in early 2001 as a disciplinary measure because they were not working as they should. Mr. Hooli and Dr. Kutty testified that the doctors were not working 40 hours per week in the clinic; would not take emergency patients; would not take walk-in patients; limited appointments to four hours per day; would not come to the clinic at all unless there was a patient; and were moonlighting at other jobs for which they were paid by other employers. Tr. at 2702, 2706-2707, 2711-2712, 2715, 2717-2718, 2722-2723, 2726, 2749-2750, 2752-2753, 2761-2763, 2765-2766, 2778-2779; GX 1 at 18-20, 28-30, 34, 220, 229, 244; *see* Respondents post-hearing brief at 17-20. Dr. Kutty felt he should not be held responsible for paying salary for hours the doctors were not in the clinic. Tr. at 2762. The Administrator took the position that the precise number of hours worked by a salaried employee is irrelevant. This position is consistent with the regulations, *see* 20 CFR § 655.731(c)(3) and (4) (1995) and 20 CFR § 655.731(c)(4) and (5) (2002). It is also consistent with the removal of the requirement previously in the regulations that an employer keep hourly wage records for full-time H-1B employees paid on a salary basis, *see* 65 Fed. Reg. at 80195 (2000). In any event, I do not credit Mr. Hooli's and Dr. Kutty's professed belief that the doctors were working less than 40 hours per week. Both testified that only work in the clinic, and not work in an emergency room, at the hospital or in nursing homes, should be counted toward the 40 hours, despite overwhelming evidence that such work was undertaken at Dr. Kutty's specific direction, and was necessary to the practice of medicine for the clinics.[31] Allegations that the doctors were paid by third parties for moonlighting or were working out of status during the time they were obligated to work only for Respondents are not supported by the evidence.[32] Although

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[31]The employment contracts specifically stated that hospital rounds would be included in the 40 hours. Five of the doctors worked in the emergency room under contract between Dr. Kutty and ECC. Dr. Kutty admitted he gave permission to the doctors to be absent from the clinic if they had worked at the emergency room. GX 1 at 236.

[32]On cross examination, based on bills dated after they left the clinics, counsel for Respondents also tried but failed to establish that the doctors had been treating patients after they left Respondents' employ, but before they were authorized by new employers. Dr. Naseem

I credit Dr. Kutty's and Mr. Hooli's testimony to the extent that they believed the doctors were not working hard enough, I also conclude that they had unreasonable expectations and exaggerated isolated incidents in an attempt to scapegoat the doctors for problems with administration of the clinics which were primarily the fault of poor management from the Florida office. By all accounts, Dr. Kutty spent very little time in Tennessee, and relied on Mr. Hooli to tell him what was going on. *See* GX 1 at 223, 225. Mr. Hooli had a limited ability to observe the doctors, and relied on faulty records which did not accurately show the full patient load (appointment books which did not show walk-ins, emergency room or hospital in-patient work, and faulty billing records). The credibility of their complaints about the doctors' work habits is undermined by Dr. Kutty's decision to retain Drs. Venkatesh and Naseem from the Tazewell clinic, supposedly among the worst offenders according to Dr. Kutty. Mr. Hooli's credibility is undermined by the testimony of Drs. Naseem and Venkatesh, who gave similar accounts of their conversation with Mr. Hooli in which he said he would lie for his friend, Dr. Kutty; and by the incident in which Mr. Hooli offered Ms. Hensley her job back if she would give a statement against the doctors. Furthermore, I found credible the doctors' testimony that they consistently worked 40 or more hours. The weight of the evidence, including consistent testimony from the doctors and staff , who were separated during the hearing, supports the conclusion that the doctors were fulfilling their obligations and trying to build their practice despite difficult conditions, including insufficient planning, over-expansion, poor management of key functions such as billing, and under-funding of the clinics by Respondents. The timing of the salary cuts in January 2001, which coincided with financial problems for the Florida clinics which were subsidizing the Tennessee operations, GX 1 at 39-40, supports the conclusion that reduced cash flow was the real reason for cutting their salaries. Dr. Kutty wrote letters accusing some of the doctors of misconduct only after he received the February 14 letter from Mr. Divine, and he sent those letters only to doctors identified as clients in Mr. Divine's letter.

Respondents offered several reasons why back wages should not be awarded to the doctors. In their pre-hearing brief at 21, Respondents argued that any H-1B employees "who illegally worked out of status for another employer . . . stole from the corporate Respondents, or . . . breached their common law Duty of Loyalty" should not receive an award. I find that the evidence does not support such allegations of misconduct against any of the doctors.

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explained that bills for services performed during employment by Respondents could have been submitted after a doctor left due to the practice of "back billing"; Medicare, for example allows up to six months to post a bill. Tr. at 1275. Dr. Ilie testified that other than discharging two patients from the hospital on March 22, he did not treat any patients after March 21 until he began employment with HealthStar on May 5, but there would have been back billing for work done before March 21. Tr. at 1714, 1721. Dr. Ionescu testified that she did not work for anyone else or treat any patients between March 21 and April 23 when she began work at Wellmont. Tr. at 1811, 1813. Dr. Speil said between March 21 and May 16, when he began working for Multispecialty Medical, he saw only one patient who had a cold, and he did not bill for it. Tr. at 1949. Dr. Venkatesh said he did not treat any patients between March 26 and May 2, 2001, when he began work in his new job. Tr. at 2458.

In their post-hearing brief, Respondents also argued:

> Based upon prevailing H-1B law, the alien doctors . . . were ineligible for H-1B visas at the time of their approvals and thus, should not now be permitted to obtain benefits from laws designed exclusively to protect valid H-1B visa holders. . . . The basis for the Respondent's arguments are as follows: first, the petitions submitted on behalf of the alien doctors lacked statutorily required evidence which should have resulted in the denial of the petitions; second, the employment contracts submitted in association with the . . . H-1B petitions required the doctors to possess certain qualifications they lacked, and thus, should have resulted in the denial of the H-1B petitions and; finally, several of the petitions contained inconsistencies between the wage stated on their LCAs and on their employment agreements which should equally have lead to denial of the petition.

Post-hearing brief at 3-4. According to Respondents, it followed that the INS erred in approving the H-1B visas, which should be revoked, and the INS, not Dr. Kutty, should bear the consequences. *See* the post-hearing brief at 4-14. I reject the premises, and the conclusion.

As to the first point in their challenge to the validity of the visas, Respondents argued that the doctors were not eligible for H-1B visas because they were not licensed to practice medicine in Tennessee when they applied for their visas. *See* the post-hearing brief at 4-5. The evidence in the record was that Tennessee would not grant a medical license until the doctors had a valid visa. Tr. at 424-425, 1462, 1859; GX 1 at 63. The "no benching" requirement supports the conclusion that the sequence of events which occurred in this case, in which visas were issued before licenses could be obtained, is allowed under the Act and regulations. A letter from Dr. Kutty to the INS in Dr. Casis' file stating that Dr. Casis was licensed in Illinois "and his application for Tennessee medical licence [sic] is pending," GX 12 at 31, and similar representations in letters in Dr. Manole's file, GX 20 at 19, Dr. Naseem's file, GX 22 at 47, and Dr. Radulescu's file, GX 24 at 31, indicate that the INS interpreted its rule in such a fashion.

The second and third points rest on the assumption that the employment agreements were submitted to the DOL along with the LCAs. There is no evidence that the employment agreements were submitted to the DOL along with the LCAs, as opposed to later, during the investigation. The regulations require only submission of the LCA form promulgated by DOL. 20 CFR § 655.730(c) (1995) and (2002). In any event, the H-1B doctors did not lack qualifications, as suggested by Respondents. All eventually obtained their Tennessee medical licenses and other credentials as required by the agreements. Moreover, Dr. Kutty signed every LCA and every employment agreement for all 17 doctors, obligating himself to observe their terms. Dr. Kutty's failure to read the LCAs when he signed them, GX 1 at 201, is not a defense. *See Administrator v. Jackson*, USDOL/OALJ Reporter (HTML), ARB No. 00-68, ALJ No. 1999-LCA-4 (ARB, April 30, 2001). In his testimony, Dr. Kutty made it clear that he never intended to pay the wage rates set forth in the LCAs. He also made it clear by his actions that he did not feel bound to pay the salaries set forth in the employment agreements. The underlying premise for these arguments, that the doctors should not receive back wages because the H-1B visas should never have been granted, penalizes the H-1B doctors for the misrepresentations by Dr.

Kutty.

Respondents' additional argument, *see* the post-hearing brief at 14-17, that the terms of the employment agreements should govern the wages owed is a two-edged sword. Even by that standard, Respondents would still owe back wages to the doctors. The terms of the statute, moreover, are clear. Respondents violated the statute by failing to pay the required wage. The case offered by Respondents in support of their argument that the employment agreements govern, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983), is not on point. The statute governs, not the employment agreements.

5. Back Wage Calculations

Back wages due to the H-1B employees are equal to the difference between the amount that should have been paid and the amount that actually was paid. 20 CFR § 655.810(a) (1995) and (2002). If actual payments exceed the amount that should have been paid for a period of time, no backpay is awarded for that period, nor is credit given against future underpayments. Tr. at 2594-2596; *see* 20 CFR § 655.731(c)(1) (1995) and (2002) (Wage must be paid "cash in hand, free and clear, when due" except for authorized deductions.).

Mr. White calculated the back wages due the H-1B employees during the investigation, Tr. at 95-101, 106-110, and recalculated them during the hearing, based on records provided by the doctors and the Respondents, and testimony by the doctors. Tr. at 2565. His revised calculations for the individual H-1B employees appear in GX 8A-Q. Mr. White entered the totals for each individual on a summary sheet, GX 7. Tr. at 2566. Testimony about the individual calculations appears in the record at pp. 2570-2614. For each doctor, he obtained the date of approval of the H-1B visa from the INS form 797. Tr. at 2571. Based on the regulations, he began the calculations 60 days later, or from the date the employees actually started working if that occurred earlier than the 60-day deadline. Tr. at 88, 2572, 2590. He based his calculations on the annualized rate of salary each doctor should have received, which he divided by 24 to obtain the semi-monthly payments. Tr. at 2572-2573. He used SESA rates, or where SESA wage rates were not available, he used the mean figure from the wage range given by the Economic Research Institute as the prevailing wage which should have been paid to the employees. Tr. at 91, 2569, 2573; GX 27A. He rejected the rates of pay on the LCAs in some instances because they did not comply with the regulations. Tr. at 2574. He included expenses and legal fees incurred by the employees for obtaining the J1 waiver and H-1B status as part of back wages. Tr. at 91. He did not include fees the employees incurred for obtaining Tennessee medical licenses, or for applications to the Drug Enforcement Administration for approval to prescribe scheduled drugs. Tr. at 91-92. He used W-2 forms, pay stubs, and other information provided by the employees to calculate the actual wages paid, Tr. at 99-100, which amounts were credited against the amount due, Tr. at 99. He also noted any time periods the employees were "benched." He held the employer responsible for periods when the employees were off work for reasons which were "employer related, for example, the building isn't ready for them yet, . . . or their credentials aren't completed yet," but not for reasons ". . . about visiting family or having been injured or something along those lines . . ." Tr. at 101. He subtracted the

amounts the doctors were actually paid, from the amounts that they should have been paid to determine the amount due to each. Mr. White revised his calculations when he discovered figures which were not correct. Tr. at 110, 111-112. Mr. White provided copies of his original and revised calculations to counsel for the Respondents during his investigation. Tr. at 107-108. At the hearing, the calculations he made after hearing the testimony of the witnesses were substituted for his earlier calculations. Tr. at 2521-2525, 2564-2565; GX 7, GX 8A-8Q.

I have carefully reviewed the testimony, exhibits, and regulations, and compared them to the calculations of the difference between the amount that should have been paid and the amount that actually was paid to the doctors, prepared by Mr. White in GX 8A-8Q. Unless otherwise indicated, I have accepted Mr. White's calculations of back wages and reimbursement of employer expenses paid by the H-1B employees (including reimbursement for attorney fees and costs incurred in obtaining J1 waivers and H-1B visa approvals) as well supported by the evidence and consistent with my findings above in the Summary of the Evidence.[33] I find that back wages and reimbursement for employer expenses are owed to the doctors in the following amounts.

Dr. Ahmed's H-1B visa was approved on May 16, 1999. Dr. Ahmed was in the United States and available for work after 60 days had passed. Her back pay period began on July 16, 1999, and ended on January 22, 2000, when she accepted other employment. During the back pay period, Dr. Ahmed should have received salary at an annual rate of $111,204, the mean rate for non-SESA rates for the Knoxville metropolitan area in which Maynardville is located, which is equivalent to $4638.50 per semi-monthly pay period. She actually received a total of $3000. I find that GX 8A accurately reflects the evidence as to the total payments she actually received in salary, the amounts she should have received, the total payments she made to obtain her J1 waiver, costs which should have been paid by the employer, and the amounts due. I find that Dr. Ahmed is entitled to $54,918.75 in back wages, and $9500 for J1 waiver fees, for a total of $64,418.75. *See* my findings above regarding Dr. Ahmed; Tr. at 2571-2577; GX 8A.

Dr. Casis' H-1B visa was approved effective on October 1, 2000. Dr. Casis was in the United States and available for work after 60 days had passed. His backpay period began on December 1, 2000, and ended on February 7, 2001, when he began work at the Tazewell clinic for a salary at the rate of $80,000.00 per year. During the back pay period, Dr. Casis should have received a salary at an annual rate of $74,464.00, the SESA rate, equivalent to $3102.67 per semi-monthly pay period. He actually received no salary during that period. I find that GX 8B accurately reflects the evidence as to the total payments he actually received in salary, i.e., none, the amounts he should have received, the total payments he made to obtain his J1 waiver and H-1B visa, costs which should have been paid by the employer, and the amounts due. I find that Dr.

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[33]I note that the DOL has taken the position that back wages and reinstatement for doctors discharged in retaliation for protected activity is a remedy available to the Secretary. *See* 65 Fed. Reg. at 80179-80180 (2002). In this case, however, Mr. White stopped all back wage calculations when the doctors left the Respondents' employ.

Casis is entitled to $13,862.02 in back wages, $7000.00 for J1 waiver fees, and $4000.00 for H-1B fees, for a total of $24,962.02. *See* my findings above regarding Dr. Casis; Tr. at 2582-2585; GX 8B.

Dr. Chicos' H-1B visa was approved on December 14, 1999. Dr. Chicos was in the United States and available for work after 60 days had passed. His backpay period began on February 14, 2000, and ended on March 31, 2001, the last pay period in which he performed work for the Tazewell clinic. During the back pay period, Dr. Chicos should have received a salary at an annual rate of $115,357, the SESA rate, equivalent to $4806.55 per semi-monthly pay period. He actually received $56,666.57 in 2000, and $8186.35 in 2001. I find that GX 8C accurately reflects the evidence as to the total payments he actually received in salary, the amounts he should have received, the total payments he made to obtain his J1 waiver and H-1B visa, costs which should have been paid by the employer, and the amounts due. I find that Dr. Chicos is entitled to $64,923.71 in back wages, and $4730.00 for J1 waiver and H-1B attorney fees and costs, for a total of $69,623.71. *See* my findings above regarding Dr. Chicos; Tr. at 2586-2588; GX 8C.

Dr. Chintalapudi's H-1B visa was approved effective on January 7, 1999. He began work on February 16, 1999. His backpay period began on February 16, 1999, and ended on December 31, 2000, after which his salary increased to a rate of $120,000 per year. During the back pay period, Dr. Chintalapudi should have received a salary at an annual rate of $111,204, the mean non-SESA rate, equivalent to $4633.50 per semi-monthly pay period. He actually received $41,666.64 in 1999, and $76,666.59 in 2000. I find that GX 8D accurately reflects the evidence as to the total payments he actually received in salary, the amounts he should have received, the total payments he made to obtain his J1 waiver and H-1B visa, costs which should have been paid by the employer, and the amounts due. I find that Dr. Chintalapudi is entitled to $90,174.27 in back wages, $6000.00 for J1 waiver fees, and $1000.00 for H-1B fees, for a total of $97,174.27. *See* my findings above regarding Dr. Chintalapudi; Tr. at 2590-2592; GX 8D.

Dr. Haque's H-1B visa was approved effective on October 1, 2000. He began work on November 1, 2000. His backpay period began on November 1, 2000, and ended on March 31, 2001, the last pay period he worked for the Rogersville Westside clinic. During the back pay period, Dr. Haque should have received a salary at an annual rate of $115,357, the SESA rate, equivalent to $4806.54 per semi-monthly pay period. He actually received $7500.00 in 2000, and $19,999.97 in 2001. I find that GX 8E accurately reflects the evidence as to the total payments he actually received in salary, the amounts he should have received, the total payments he made to obtain his J1 waiver and H-1B visa, costs which should have been paid by the employer, and the amounts due. I find that Dr. Haque is entitled to $20,565.43 in back wages, $4500.00 for J1 waiver fees, and $1000.00 for H-1B fees, for a total of $26,065.43. *See* my findings above regarding Dr. Haque; Tr. at 2592-2593; GX 8E.

Dr. Ilie's first H-1B visa was approved effective on February 2, 1999. Dr. Ilie was in the United States and available for work after 60 days had passed. His backpay period began on April 2, 1999, and ended on March 31, 2001, the last pay period he worked at the Rogersville

Main Street clinic. During the back pay period, Dr. Ilie should have received a salary at an annual rate of $52,291, the SESA rate, equivalent to $2178.80 per semi-monthly pay period. He actually received $29,999.93 in 1999, $66,666.63 in 2000, and $9999.98 in 2001. I find that GX 8F accurately reflects the evidence as to the total payments he actually received in salary, the amounts he should have received, the total payments he made to obtain his J1 waiver and H-1B visa, costs which should have been paid by the employer, and the amounts due. I find that Dr. Ilie is entitled to $14,470.09 in back wages, $6000.00 for J1 waiver fees, and $5220.00 for H-1B fees, for a total of $25,690.09. *See* my findings above regarding Dr. Ilie; Tr. at 2593-2596; GX 8F.

Dr. Ionescu's first H-1B visa was approved effective on February 23, 1999. Dr. Ionescu was in the United States and available for work after 60 days had passed. Her backpay period began on April 23, 1999, and ended on March 31, 2001, the last pay period she worked at the Rogersville Main Street clinic. During that period, Dr. Ionescu should have received a salary at an annual rate of $52,291, the SESA rate, equivalent to $2178.80 per semi-monthly pay period. She actually received $20,000.02 in 1999, $66,6666.66 in 2000, and $9999.98 in 2001. I find that GX 8G accurately reflects the evidence as to the total payments she actually received in salary, the amounts she should have received, the total payments she made to obtain her J1 waiver and H-1B visa, costs which should have been paid by the employer, and the amounts due. I find that Dr. Ionescu is entitled to $19,022.90 in back wages, $6000.00 for J1 waiver fees, and $5220.00 for H-1B fees, for a total of $30,242.90. *See* my findings above regarding Dr. Ionescu; Tr. at 2596-2597; GX 8G.

Dr. Kanagasegar's H-1B visa was approved effective on October 1, 2000. Dr. Kanagasegar testified that while he waited for employment by Respondents, from June 2000 to January 2001, he worked as a research assistant, and then he visited India for two months. Tr. at 2173. In his back wage computation for Dr. Kanagasegar, Mr. White included back pay for the month of December 2000, while Dr. Kanagasegar was still working for another employer, but not for the two-month period he was in India. Dr. Kanagasegar testified that he wanted to take a break between jobs to see his family, that he sought permission from Dr. Kutty to take the trip, and that the trip was purely voluntary. Tr. at 2172-2173. Based on the statutory language in 8 U.S.C. § 1182(n)(2)(C)(vii)(IV), the two-month period of the trip to India was properly excluded from the calculation of back pay. There is no provision in the INA stating that wages due based on the 60-day rule should be mitigated because the H-1B employee has alternate employment. Nonetheless, based on Mr. White's testimony regarding his calculations for Dr. Radulescu, it is apparent that Mr. White did not intend to include any time an H-1B employee was being paid by another employer in the back pay period.[34] I conclude that that is a reasonable application of the

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[34]The pertinent exchange regarding the calculation for Dr. Radulescu went as follows:

> Q[uestion] . . . Can you explain the . . . 90 days instead of the 60-day hiatus there.
>
> A[nswer] Yes. That was . . . extended out because, based on our information, he

statute, and that the month of December was included in Mr. White's calculation for Dr. Kanagasegar by mistake. I therefore find that Dr. Kanagasegar's back pay period began at the beginning of March 2001 when he returned from India, and ended on March 16, 2001, when he began working with a salary rate of $80,000 per year. During the back pay period, Dr. Kanagasegar should have received a salary at an annual rate of $74,464.00 per year, the SESA rate, equivalent to $3102.67 per semi-monthly pay period. He was not paid during the first semi-monthly pay period in March. I find that GX 8H accurately reflects the evidence as to the total payments Dr. Kanagasegar actually received in salary, i.e., none, the amount he should have received, the total payments he made to obtain his J1 waiver and H-1B visa, costs which should have been paid by the employer, and the amounts due, except that he was entitled to back wages for only one pay period in 2001, and none in 2000. I find that Dr. Kanagasegar is entitled to $3102.67 in back wages, $7000.00 for J1 waiver fees, and $3900.00 for H-1B fees, for a total of $14,002.67. *See* my findings above regarding Dr. Kanagasegar; Tr. at 2598-2599; GX 8H.

Dr. Khan's H-1B visa was approved on December 10, 1998. He began work on December 15, 1998. His backpay period began on December 15, 1998, and ended on March 31, 2001, the last pay period he worked for the Maynardville clinic. During that period, Dr. Khan should have received a salary at an annual rate of $111,204, the mean non-SESA rate, equivalent to $4638.50 per semi-monthly pay period. He actually received $1230.72 in 1998, $45,153.84 in 1999, $71,458.27 in 2000, and $11,666.65 in 2001. I find that GX 8I accurately reflects the evidence as to the total payments he actually received in salary, the amounts he should have received, and the total payments he made to obtain his J1 waiver and H-1B visa, costs which should have been paid by the employer, and the amounts due. I find that Dr. Khan is entitled to $125,333.02 in back wages, $6000 for J1 waiver fees, $7201.83 for H-1B fees, for a total of $138,543.85. *See* my findings above regarding Dr. Khan; Tr. at 2599-2601; GX 8I.

Dr. Manole's H-1B visa was approved on April 13, 2000, effective January 1 2000. Dr. Manole was in the United States and available for work when his visa was approved. Mr. White

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> had actually been . . . working and receiving pay at another employer through the end of January of 2001, so we obviously weren't going to compute back wages when he was being paid through another employer.

Tr. at 2606-2607. In their pre-hearing brief, Respondents alleged that the Administrator failed to mitigate back wage calculations and that Respondents are entitled to an offset for outside earnings. Pre-hearing brief at 16, 20. I have found that the doctors had no outside earnings during the time they worked for Respondents. Because Mr. White omitted (or intended to omit) from his calculations (1.) periods before the doctors' employment with Respondents began, during which they were still being paid by their previous employers; and (2.) periods after they accepted other employment or left Respondents' employ, even if they were not paid immediately by their new employers, it appears that the Administrator did take mitigation into account in determining the back wages due the H-1B employees.

calculated back wages as if Dr. Manole should have started work on March 1, 2000, 60 days after the effective date of his H-1B visa. The regulations provide, however, that Respondents could not allow Dr. Manole to begin work until his visa was approved. The earliest pay period that Dr. Manole could have worked, therefore, was the second semi-monthly pay period in April. His backpay period began on April 16, 2000, and ended on February 26, 2001, when he obtained other employment. During that period, Dr. Manole should have received a salary at an annual rate of $115,357, the SESA rate. He actually received $19,999.92 in 2000, and $3333.32 in 2001. I find that GX 8J accurately reflects the evidence as to the total payments he actually received in salary, the amounts he should have received, the total payments he made to obtain his H-1B visa, a cost which should have been paid by the employer, and the amounts due, except that I have reduced time period for which back wages were calculated from 20 to 17 semi-monthly pay periods in the year 2000 to eliminate payment for the period from March 1 to April 15. I find that Dr. Manole is entitled to $77,604.09 in back wages, and $3700.00 for H-1B fees, for a total of $81,204.09. *See* my findings above regarding Dr. Manole; Tr. 2601-2602 ; GX 8J.

Dr. Munteanu's H-1B visa was approved effective on October 1, 2000. Dr. Munteanu was in the United States and available for work after 60 days had passed. His backpay period began on December 1, 2000, and ended on March 15, 2001, when he obtained other employment. During the back pay period, Dr. Munteanu should have received a salary at an annual rate of $102,627, the SESA rate, equivalent to $4276.13 per semi-monthly pay period. He was not paid anything by the Respondents. I find that GX 8K accurately reflects the evidence as to the total payments he actually received in salary, i.e., none, the amounts he should have received, the total payments he made to obtain his J1 waiver and H-1B visa, costs which should have been paid by the employer, and the amounts due. I find that Dr. Munteanu is entitled to $29,932.91 in back wages, $7000.00 for J1 waiver fees, and $4500.00 for H-1B fees, for a total of $41,432.91. *See* my findings above regarding Dr. Munteanu; Tr. at 2603; GX 8K.

Dr. Naseem's H-1B visa was approved on January 3, 2000. Dr. Naseem was in the United States and available for work after 60 days had passed. His backpay period began on March 3, 2000, and ended on March 31, 2001, the last pay period he worked at the Tazewell clinic. During the back pay period, Dr. Naseem should have received a salary at an annual rate of $115,356, the SESA rate, equivalent to $4806.55 per semi-monthly pay period. I find that GX 8L accurately reflects the evidence as to the total payments he actually received in salary, the amounts he should have received, the total payments he made to obtain his J1 waiver and H-1B visa, costs which should have been paid by the employer, and the amounts due. I find that Dr. Naseem is entitled to $57,521.66 in back wages, $7000.00 for J1 waiver fees, and $5320.00 for H-1B fees, for a total of $69,841.66. *See* my findings above regarding Dr. Naseem; Tr. at 2604; GX 8L.

Dr. Qadir's H-1B visa was approved effective on October 1, 1999. Dr. Qadir was in the United States and available for work after 60 days had passed. His backpay period began on December 1, 1999, and ended on March 31, 2001, the last pay period he worked at the Rogersville Main Street clinic. During the back pay period, Dr. Qadir should have received a salary at an annual rate of $111,204, the mean non-SESA rate, equivalent to $4633.50 per semi-

monthly pay period. I find that GX 8M accurately reflects the evidence as to the total payments he actually received in salary, the amounts he should have received, the total payments he made to obtain his J1 waiver and H-1B visa, costs which should have been paid by the employer, and the amounts due. I find that Dr. Qadir is entitled to $102,269.32 in back wages, $3750.00 for J1 waiver fees, and $3199.01 for H-1B fees, for a total of $109,217.83. *See* my findings above regarding Dr. Qadir; Tr. at 2605-2606; GX 8M.

Dr. Radulescu's H-1B visa was approved effective on October 1, 2000. Dr. Radulescu was in the United States and available for work after 60 days had passed, but continued to work for another employer until he moved to Tennessee in early February. His backpay period began on February 1, 2001, and ended on April 16, 2001, the effective date of the agreement making the previous employment agreement with Dr. Radulescu null and void (GX 59). During the back pay period, Dr. Radulescu should have received a salary at an annual rate of $74,464, the SESA rate, equivalent to $3102.67 per semi-monthly pay period, but received no pay from the Respondents. I find that GX 8N accurately reflects the evidence as to the total payments he actually received in salary, i.e., none, the amount he should have received, the total payments he made to obtain his J1 waiver and H-1B visa, costs which should have been paid by the employer, and the amounts due. I find that Dr. Radulescu is entitled to $15,513.85 in back wages, $7136.00 for J1 waiver fees, and $3500.00 for H-1B fees, for a total of $26,149.35. *See* my findings above regarding Dr. Radulescu; Tr. at 2606-2607; GX 8N.

Dr. Rohatgi's H-1B visa was approved on June 20, 2001. Dr. Rohatgi was in the United States and available for work after 60 days had passed. His backpay period began on August 20, 2000, and ended on March 31, 2001, the last pay period he worked at either Rogersville clinic. During the back pay period, Dr. Rohatgi should have received a salary at an annual rate of $59,738, the SESA rate, equivalent to $2489.09 per semi-monthly pay period. He actually received $7500.00 in 2000, and $16,666.64 in 2001. I find that GX 8O accurately reflects the evidence as to the total payments he actually received in salary, the amounts he should have received, the total payments he made to obtain his J1 waiver and H-1B visa, costs which should have been paid by the employer, and the amounts due. I find that Dr. Rohatgi is entitled to $14,901.31 in back wages, $7000.00 for J1 waiver fees, and $3000.00 for H-1B fees, for a total of $24,901.81. *See* my findings above regarding Dr. Rohatgi; Tr. at 2607-2610; GX 8O.

Dr. Speil's H-1B visa was approved on November 4, 1999. Dr. Speil was in the United States and available for work after 60 days had passed. His backpay period began on January 4, 2000, and ended on March 31, 2001, the last pay period he worked in the Tazewell clinic. During that period, Dr. Speil should have received a salary at an annual rate of $115,357, the SESA rate, equivalent to $4806.55 per semi-monthly pay period. I find that GX 8P accurately reflects the evidence as to the total payments he actually received in salary, the amounts he should have received, the total payments he made to obtain his J1 waiver and H-1B visa, costs which should have been paid by the employer, and the amounts due. I find that Dr. Speil is entitled to $71,190.36 in back wages, and $4866.00 for J1 waiver and H-1B fees, for a total of $97,555.00. *See* my findings above regarding Dr. Speil; Tr. at 2610-2611; GX 8P.

Dr. Venkatesh's H-1B visa was approved effective on March 24, 1999. Dr. Venkatesh was in the United States and available for work after 60 days had passed. His backpay period began on May 24, 1999, and ended on March 31, 2001, the last pay period he worked at the Tazewell clinic. During that period, Dr. Venkatesh should have received a salary at an annual rate of $111,204, the mean non-SESA rate, *see* GX27A, equivalent to $4633.50 per semi-monthly pay period. I find that GX 8Q accurately reflects the evidence as to the total payments he actually received in salary, the amounts he should have received, the total payments he made to obtain his J1 waiver, which should have been paid by the employer, and amounts due, except that I find he paid a total of $6908.00 in attorney fees and costs for his H-1B visa, in stead of $6408.00 as appears on GX8Q. I find that Dr. Venkatesh is entitled to $86,359.70 in back wages, $10,000.00 for J1 waiver fees, and $6908.00 for H-1B fees, for a total of $103,267.70. *See* my findings above regarding Dr. Venkatesh; Tr. at 2611-2614; GX 8Q.

D. Retaliation for Engaging in Protected Conduct.

The Administrator alleged that Respondents discharged seven of the doctors (Drs. Chicos, Haque, Ilie, Ionescu, Khan, Qadir and Speil), and constructively discharged two others (Drs. Naseem and Venkatesh) by withholding their pay, in retaliation for engaging in protected conduct. Tr. at 2639; GX 30. The INA, as amended by ACWIA, provides:

> (iv) It is a violation of this clause for an employer who has filed an application under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.

8 U.S.C. § 1182(n)(2)(C)(iv) (emphasis added). The regulations echo that language. 20 CFR § 655.801(a) (2002). As the language and intent of this provision is similar to the employee protection provisions contained in the nuclear and environmental whistleblower statutes administered by the Department of Labor, the same analysis applies. 65 Fed. Reg. 80178 (2000) ("The Department is of the view that Congress intended that the Department, in interpreting and applying this provision, should be guided by the well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by this Department (see 29 CFR part 24)."); *see Administrator v. IHS, Inc.*, USDOL/OALJ Reporter (HTML), ALJ No. 93-ARN-1 at 74 (ALJ Mar. 18, 1996).

In order to prevail on the retaliation claim, the Administrator must establish by a preponderance of the evidence that the Respondents took adverse employment action against the H-1B employees because they engaged in protected activity. *Carroll v. U.S. Dep't of Labor,* 78 F.3d 352, 356 (8th Cir. 1996); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 277-278 (7th Cir. 1995).

Whistleblower cases are analyzed under the framework of precedent developed in retaliation cases under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, et seq and other anti-discrimination statutes. *See Overall v. Tennessee Valley Authority*, USDOL/OALJ Reporter (HTML), ARB Nos.1998-111, 128, ALJ No. 1997-ERA-53, at 12-13 (ARB Apr. 30, 2001), citing, inter alia, *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks,* 450 U.S. 502 (1993); and *Reeves v. Sanderson Plumbing Products, Inc.,* 120 S.Ct. 2097 (2000).

Where there is direct evidence of discrimination, then the Administrator prevails unless the Respondents can establish an affirmative defense. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 997 (2002) (Title VII case)*; Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-122 (1985) (Age Discrimination in Employment Act ("ADEA") case). Unlike Title VII and the ADEA, the INA does not contain any affirmative defenses to an allegation of discrimination.

When direct evidence of discrimination is not available, the Administrator first must create an inference of unlawful discrimination by establishing a prima facie case of discrimination, by showing that the Respondents are subject to the Act; that the employees engaged in protected activity; that they suffered adverse employment action; and that a nexus exists between the protected activity and adverse action. The Administrator must show that the respondent had knowledge of the protected activity to establish a prima facie case. *See Bartlik v. U.S. Dept. of Labor*, 73 F.3d 100, 102, 103 n.6 (6th Cir. 1996); *Carroll v. U.S. Dept. of Labor*, 78 F.3d 352, 356 (8th Cir. 1995); *Cohen v. Fred Meyer, Inc.*, 686 F. 2d 793, 796 (9th Cir. 1982); 29 CFR § 24.5(a)(2). The burden then shifts to the Respondents to produce evidence that they took adverse action for a legitimate, nondiscriminatory reason. The burden of persuasion remains at all times with the Administrator, who must prove by a preponderance of the evidence that the Respondents' proffered reasons were not the true reasons and constitute a pretext for discrimination. *Burdine*, 450 U.S. at 253.

In a mixed motive case, once the Administrator has made a showing that protected activity "was a contributing factor" in the adverse action, the burden of persuasion shifts to the employer to demonstrate "by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior." *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 287 (1977); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-245 (1989).

In this case, the Administrator alleged that Respondents discriminated against 9 of the 10 doctors represented by Mr. Divine.[35] Based on the evidence now in the record, I conclude that there were actually two discrete acts of discrimination against those doctors: (1) first, when Mr. Divine demanded payment from Dr. Kutty of the wages required by the INA on behalf of eight of the doctors, Dr. Kutty stopped paying any salary to those eight; and (2) second, when they

[35]The only exception was Dr. Rohatgi.

complained to the DOL, Dr. Kutty fired seven of ten doctors eventually represented by Mr. Divine.[36]

In January 2001, Dr. Kutty cut the salary he was paying to most of the doctors. On February 14, 2001, Mr. Divine wrote a letter on behalf of Drs. Chicos, Ilie, Ionescu, Khan, Naseem, Qadir, Speil and Venkatesh advising Dr. Kutty that the doctors he represented were not being paid in accordance with the requirements of the INA and demanding immediate payment of all amounts due. GX 33. Dr. Kutty immediately stopped paying any salary to them. He gave no explanation to Drs. Khan, Qadir or Speil; he wrote letters to Drs. Chicos, Ilie, Ionescu, Naseem and Venkatesh accusing them of failing to meet their obligation to work 40 hours and other misconduct. Dr. Kutty testified as follows about why he cut the salaries, and then stopped paying salaries altogether to the eight doctors identified in Mr. Divine's February 14 letter:

> And at that stage I said start calculating on what hours these doctors work based on their own claim that we just worked – we just came to the clinic and after we saw the patient we left.
>
> Through the billing records – their own billing records it shows how many minutes they saw the patients. We used that as the calculation.
>
> I think Mr. Hooli has testified we talked to them several times to try and get them to fulfill their part of the contract, to start using the equipment, to start seeing the patients, which they ignored.
>
> At that stage we saw that the census – they became concerned. The census in the clinics rose . . .
>
> And at that stage I talked to Mr. Hooli and said, okay, . . . send them their salaries again according to what they are working now. We will hold the excess amounts . . . continue paying them . . . as long as we are satisfied that they are going to continue to work.
>
> The next thing that we saw was that we get this letter that we . . . are in violation . . . from . . . Mr. Divine, the attorney for seven of the doctors, that we have not paid them their salaries.

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[36]The letters of determination found discrimination in that a total of nine doctors were terminated. At hearing, Ms. Sanders testified that she viewed the failure to pay salaries in the cases of two doctors who resigned, Drs. Naseem and Venkatesh, to be a constructive discharge. Tr. at 2639, 2649. The Administrator's briefs did not address the legal standard which must be met to establish a constructive discharge. As I have found that Respondents retaliated against Dr. Naseem and Dr. Venkatesh by withholding their salary, I will not address the allegation of constructive discharge further.

My position at that time was that we have overpaid these doctors, since the number of hours that they have spent in the clinic did not justify what they had agreed to, that they would spend 40 hours in the clinic.

Most of them looked like they had spent about 20 hours in the clinic. And when we consider that amount of months that they had worked, we had easily paid most of these doctors about $30,000 in excess.

So, that was the position that we took, and that was the reason why we did not pay them for those next two months, and we told them that that was the reason why we did not, you know, for those two months.

Tr. at 2754-2756 (emphasis added). I find this to be an admission that the doctors' salary was withheld because Mr. Divine notified Dr. Kutty that they had been paid less than the amount required by law. This admission constitutes direct evidence of discrimination against the doctors for disclosing information to their employer that they reasonably believed evidenced a violation of the INA.

On February 28, 2001, Mr. Divine filed the written complaint with the DOL. GX 28. DOL notified Dr. Kutty it would be conducting an investigation on March 21, 2001, by letter dated March 19, 2001, which was transmitted by facsimile. GX 64; GX 82. Ms. Kibler conducted her on-site record inspection at the Hudson, Florida, office on March 21, 2001. Also on March 21, 2001, Mr. Divine faxed a letter to Dr. Kutty demanding that Drs. Rohatgi and Haque receive back wages owed to them. GX 34. Later that day, Dr. Kutty fired Drs. Chicos, Haque, Ilie, Ionescu, Khan, Qadir and Speil. Drs. Naseem, Rohatgi and Venkatesh were the only doctors among the ten represented by Mr. Divine who were not fired, and according to Dr. Kutty's testimony, the reason he kept them on was because he needed them to have a "going concern." Tr. at 2760. Dr. Kutty also retained Drs. Chintalapudi, Casis and Kanagasegar, none of whom were represented by Mr. Divine. In their pre-hearing brief, Respondents suggested that they had no knowledge that a letter from Mr. Divine triggered the investigation. Pre-hearing brief at 18. That assertion is contradicted by the evidence that Mr. Hooli told Annette Fonte on March 23 that the doctors had "turned him in to the labor board." Tr. at 2035. Whether or not he and Dr. Kutty had actually seen the letter, I infer that they blamed Mr. Divine's clients for instigating the investigation.

Dr. Kutty gave the following explanation why the doctors were fired:

Secondly, at that meeting, Sandra Kibler. I explained to her what our position was, that we had overpaid these doctors. By that stage, the finances of the company was not good enough and I got some documents to show that we took a second mortgage on the house to meet payroll.

At that stage she said, and I think there is probably a lot of ignorance on my part, that we could not not pay these doctors. The only choice for us was we could fire them.

And so, it had nothing to do with them complaining to the Department of Labor that we terminated them. In fact, we only terminated them according to what we felt would work for the company.

The doctors who were the most . . . like Dr. Venkatesh and Dr. Shoaib Naseem and Dr. Rohatgi, who was the other cardiologist, to me, it was a plan to keep the organization viable so we kept the two cardiologists and one internist in that area and we felt that that would make this organization still continue.

And all those whom we could not afford to keep at that particular moment, we terminated them because that is the recommendation that we got from the Department of Labor as to what we should do in a situation like that.

She said if you don't have the finances, nobody can force you to . . . keep them . . . on the payroll, and we do have the closing document on the second mortgage on my house for March 21st when she was there.

Tr. at 2759-2760. Dr. Kutty went on to testify that Dr. Naseem and Dr. Venkatesh did not make any additional effort, and Dr. Rohatgi wanted to leave Tennessee, and all three quit on their own. Tr. at 2761. In their post-hearing brief at 20-22, Respondents argued that firing "the under qualified and underperforming . . . doctors" was justified and required by the statute, as Respondents could not pay their full salary. I have already found that the doctors were neither under-qualified, nor under-performing. Nor does the statute justify or require firing the doctors under the circumstances of this case.

During her testimony on direct examination, Ms. Kibler denied telling Dr. Kutty he could fire any of the doctors. She testified that she said that it was too late to fire them. *See* the discussion of her testimony above. With regard to the allegations of retaliation in connection with the seven doctors who were fired on March 21, Dr. Kutty and Ms. Sanders had the following exchange:

Q[uestion] Penalties. Again, why were the penalties given when the employees were terminated because the Labor Department itself asked me to do that?

. . .

THE WITNESS: Okay. It's not . . . my idea that the Labor Department told you to fire anybody, but the fact of the matter is that when the doctors . . . asked for their public access files, our information was, after that time they basically stopped being paid.

And then on the day that our investigator went to get the records . . . seven of them were fired and the other two that we maintain were constructively terminated, did not receive any pay, which is the same thing as terminating them, if you don't pay somebody.

. . .

BY DR. KUTTY:

Q [uestion] Why are we being assessed again these amounts for terminating those employees, because again, according to the . . . regulations which were given to me . . . it was said that I cannot not pay them. I could terminate them, and that was the recourse that I had in that situation.

[Answer] We, you had stopped paying them at an earlier time, and we felt that the reason they were actually terminated was because they had raised these objections and complaints based on the information that we had.

Tr. at 2648-2650.

I credit Ms. Kibler's testimony that she did not tell Dr. Kutty he could fire the doctors. In light of his actions when he received the February 14 and March 21 letters from Mr. Divine, I conclude that retaliatory motive was at least a contributing cause to the terminations. Putting Dr. Kutty's testimony in the best light, even if I conclude that he misunderstood what Ms. Kibler told him, and that financial difficulties were also a contributing factor, I conclude that the decision to terminate the doctors was inextricably linked to their having complained to Dr. Kutty and the DOL about the failure to pay them the salary required by the INA. I further find that Dr. Kutty has failed to prove that he would have fired the doctors even had they not complained to him and the DOL. Thus I also find that Dr. Kutty discriminated against Drs. Chicos, Haque, Ilie, Ionescu, Khan, Qadir and Speil by terminating them for complaining about their salaries.

E. Failure to Maintain Payroll Records.

The regulations require the employer to develop and maintain "documentation sufficient to meet its burden of proving the validity of the wage statement" in the LCA, and documentation of wage rates for H-1B and other employees, including payroll records for each employee including, inter alia, total wages paid each pay period, and total additions to or deductions from pay each pay period. 20 CFR § 655.731(b)(1) (1995) and (2002). Respondents have not disputed that they were unable to produce such records for the investigator. I find that the Administrator's determination that Respondents violated this requirement is supported by the evidence from the investigator, Ms. Kibler. In any event, the Administrator has not assessed any civil penalty for this violation.

F. Failure to Make Labor Condition Applications and Other Necessary Documents Available for Public Examination.

The regulations requiring H-1B employers to maintain documents for public examination are found at 20 CFR § 655.760 (1995) and (2002). The Administrator's determination on this issue is also supported by Ms. Kibler's testimony. Respondents have not suggested that they

complied with these requirements. They only suggest that they are not responsible for their failure, because Dr. Kutty was unaware of the requirements, and his attorney removed documents from the premises. As early as December 1998, however, Dr. Kutty received specific written instructions about his obligations to maintain files for public inspection, as well as suggestions as to how to go about fulfilling that obligation.

One of the documents Ms. Kibler copied during her on-site investigation was a letter to Dr. Kutty from an attorney dated December 18, 1998, which contained over three pages of instructions to Dr. Kutty about how to comply with the requirements of the H-1B program, including the following:

> As a condition precedent to completing, signing and filing [an LCA] on behalf of an alien the employer seeks to hire pursuant to H-1B nonimmigrant status, the employer agrees to develop and maintain documentation sufficient to prove the validity of the four "labor conditions" to which it must attest: that is, its statements pertaining to 1) wages; 2) working conditions; 3) the absence of a strike or lockout; and 4) notice. As an integral part of this obligation, the employer must also maintain two relevant files for each H-1B alien: a less extensive — *but absolutely required* — file for public examination; and a more extensive file for examination by the U.S. Department of Labor.
>
> . . .
>
> Below, we have detailed what the employer is required to make available for public examination (within one working day of the LCA filing); and what is to be made available for examination, by the DOL, in the event of either a complaint-driven investigation, or in the event of a DOL-directed investigation in the absence of a complaint.
>
> . . .
>
> We also recommend setting up two physical files: the "Public File" and the "Department of Labor (DOL) File." These files can be set up as two sub-files in the foreign nation's personnel file, or as stand-alone immigration files. We strongly recommend that two separate stand-alone files be set up for this (and every other past and current) case where a LCA has been filed with the DOL, and that all such files be segregated and kept in a central location at the place of employment or at the employer's principal place of business. In the event of a DOL inspection, *all* LCA files pertaining to all LCA/H-1B cases filed by the employer anywhere in the U.S. may be requested by the DOL, so a central location for quick access — either at the place of employment (which could vary from case to case), or at the employer's principal place of business (which will not vary from case to case) — is both convenient and prudent.
>
> . . .

> As stated above, the two separate files for public examination and for inspection by DOL must be established and maintained: the employer is given no credit for substantial compliance; this is an absolute requirement).
>
> . . .
>
> Should you have any questions at all about this obviously onerous process, we encourage you to not hesitate to contact our office. While the statistical likelihood, combined with your good-faith efforts, suggests that there will not be either a complaint or a DOL inspection, the potential penalties are so disproportionately high — particularly *debarment* which could close off your entire company's access to the immigration system for a year, that the mere possibility of a problem mitigates in favor of meticulous compliance.

Tr. at 2060; GX 67. Dr. Kutty's failure to comply with the regulations is not excused by his failure to read those instructions. *See Administrator v. Jackson*, USDOL/OALJ Reporter (HTML), ARB No. 00-68, ALJ No. 1999-LCA-4 (ARB, April 30, 2001) (Employer who failed to read LCA when he signed it not excused from paying the wage rate set forth in the LCA).

The Administrator has assessed a penalty of $800 per violation, which is within the range of penalties for a non-willful violation.

G. Civil Money Penalties.

The three-tiered structure of civil money penalties in the Act provides for a fine of up to $1000 for a non-willful violation, up to $5000 for a willful violation and for retaliation, and up to $35,000 for a willful violation in the course of which a United States worker is displaced. 8 U.S.C. § 1182(n)(2)(C). In this case the Administrator seeks civil money penalties of $4000 per violation for willfully failing to pay the required wage, $4000 per violation for retaliation against H-1B employees, and $800 per violation for failing to maintain public access files. No penalties have been assessed for the failure to maintain payroll records. Tr. at 2640-2645; GX 30; GX 83.

The regulations define a "willful failure" as "a knowing failure or a reckless disregard with respect to whether the conduct was contrary [to the INA], or § 655.731 or 655.732 of this part. See *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); see also *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985)." 29 CFR § 655.805(b) (1995) and 29 CFR § 655.805(c) (2002). In their pre-hearing brief at 17, Respondents suggested that the fact "that Respondents hired an attorney to do the paperwork . . . obviates against a finding of a knowing or reckless disregard with respect to whether the conduct was contrary to law." Dr. Kutty admitted that he knew he was not going to pay the doctors the amounts listed in the LCAs, GX 1 at 212, despite having signed a declaration that the information on the LCAs was correct, and despite having signed an agreement to abide by the terms of the LCAs when he signed the H-1B petitions. The fact that he hired an attorney to do the paperwork did not excuse him from living up to those agreements. When he received specific written advice from attorneys about the requirement that

he pay the higher of the actual or prevailing wage rate, the requirement that he pay workers without licenses regardless of their inability to work, and the requirement of making the LCAs and other documents available for public inspection, he ignored it. *See* GX 23 at 33-43; GX 67. He knew he was failing to pay the promised wage rates, and he showed reckless disregard of the requirements of the Act when he failed to read forms he was signing or written advice he was given. I conclude that Dr. Kutty's failure to pay the required wage rates to any of the 17 H-1B doctors was willful under the definition contained in the regulations.

The DOL is vested with enforcement discretion, and may consider the totality of circumstances, including an employer's demonstrated good faith attempts at compliance, in determining remedies to be applied. *See* 65 Fed. Reg. at 80180 (2000). In determining the amount of civil money penalties, the regulations provide that

> . . . the Administrator shall consider the type of violation committed and other relevant factors. The factors which may be considered include, but are not limited to, the following:
>
> (1) Previous history of violation, or violations . . .
>
> (2) The number of workers affected . . .
>
> (3) The gravity of the violation or violations;
>
> (4) Efforts made by the employer in good faith to comply with the provisions of [the statute and regulations];
>
> (5) The employer's explanation of the violation or violations;
>
> (6) The employer's commitment to future compliance; and
>
> (7) The extent to which the employer achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties.

20 CFR § 655.810(c) (2002).

The Administrator's Determinations assessing back wages and civil money penalties were signed by Sandra R. Sanders, the Assistant District Director for the Wage and Hour Division. GX 30. Asked what factors she considered in determining the penalties, Ms. Sanders answered:

> A[nswer] Well, the investigation was the first under H-1B, which we did take into consideration, however the violations were so egregious that they were considered willful violations.

The LCAs clearly set out what the required wage rate was, and Dr. Kutty signed

the LCAs and they were checked. The agreement was to pay the prevailing wage, which was listed.

It also – the LCAs list the fact that the documents are supposed to be kept. So, there were so many people involved in this that it was considered a – willful violations.

Q[uestion] Did you take into consideration the contract – employment contracts that were signed?

A[nswer] Right. But not only were these LCAs submitted and agreed to pay that rate, but then subsequently contracts were signed with the doctors indicating they would be paid a lower rate of pay than what was on the LCA, and even after that, many times they weren't paid the rates even in the contract.

So, it looked like there was definitely no idea of paying the stated wage rate on the LCA.

Tr. at 2638. On cross examination by Dr. Kutty, Ms. Sanders was asked again whether she took the provisions of the employment agreements with the doctors into account in assessing the penalties. She responded, "We took into account what the law is, regardless of what the contract said. We enforce the H-1B law, not contracts that you made with the doctors." Tr. at 2648. She also testified regarding the individual penalties sought for each violation. Tr. at 2640-2645.

The decision whether to impose a penalty, and, within the limits imposed by the statute, the amount, is discretionary. My review of such discretionary action is limited to whether the penalties imposed by the Administrator are arbitrary, capricious, or an abuse of discretion. In this case, there were 17 workers affected; the violations were serious and pervasive; there is little evidence of good faith efforts to comply with the law on the part of Dr. Kutty; his explanations provide inadequate justification for his actions; he has shown little or no commitment to future compliance; and the potential adverse effects on the doctors, in terms of both financial loss and threatened deportation, were extensive. In view of my findings on the merits of the alleged violations, I conclude that the penalties assessed by the Administrator in this case are eminently reasonable. I find that the Respondents should pay the fines assessed by the Administrator as follows:

H-1B Employee	Penalty for Willful Failure to Pay Required Wages and Business Expenses	Penalty for Discrimination for Engaging in Protected Activity	Penalty for Failure to Maintain Public Access Files	Total Penalties
Dr. Ahmed	$4000		$800	$ 4,800

H-1B Employee	Penalty for Willful Failure to Pay Required Wages and Business Expenses	Penalty for Discrimination for Engaging in Protected Activity	Penalty for Failure to Maintain Public Access Files	Total Penalties
Dr. Casis			$800	$ 800
Dr. Chicos Dr. Speil	$8000	$8000	$800	$ 16,800
Dr. Chintalapudi	$4000		$800	$ 4,800
Dr. Haque	$4000	$4000	$800	$ 8,800
Dr. Ilie	$4,000	$4,000	$800	$ 8,800
Dr. Ionescu	$4,000	$4,000	$800	$ 8,800
Dr. Kanagasegar			$800	$ 800
Dr. Khan	$4,000	$4,000	$800	$ 8,800
Dr. Manole	$4,000		$800	$ 4,800
Dr. Munteanu	$4,000		$800	$ 4,800
Dr. Naseem	$4,000	$4,000	$800	$ 8,800
Dr. Qadir	$4,000	$4,000	$800	$ 8,800
Dr. Radulescu	$4,000		$800	$ 4,800
Dr. Rohatgi	$4,000		$800	$ 4,800
Dr. Venkatesh	$4,000	$4,000	$800	$ 8,800
Total				$108,800

H. Individual Liability of Dr. Kutty

As respondents in these cases, the Administrator named Dr. Kutty individually (doing business as the various named corporate entities), and the corporate entities named as the employers on the LCAs submitted on behalf of the 17 doctors, including the Center for Internal Medicine and Pediatrics, Inc.; Center for Internal Medicine and Pediatrics, Inc. d/b/a Center for Internal Medicine; Center for Internal Medicine and Pediatrics, P.C.; Center for Internal Medicine and Pediatrics, P.C. d/b/a the Center for Internal Medicine and Pediatrics; Sumeru Health Care Group, Inc.; and Sumeru Health Care Group, Inc. d/b/a Sumeru Health Care Group.

See GX 30. The Administrator seeks to hold Dr. Kutty individually liable for the back wages and civil money penalties assessed as the alter ego of the corporations named on the LCAs he submitted by piercing the corporate veil, and as the true employer of the 17 doctors. Respondents contend that Dr. Kutty acted in good faith and should not be found to be personally liable. Post-hearing brief at 22-25.

1. Piercing the Corporate Veil

The record discloses a confusing web of corporations owned and operated by Dr. Kutty with some connection to the H-1B workers in this case, not all of which have been named as respondents by the Administrator. Dr. Kutty largely disclaimed any specific knowledge of how the businesses were organized and interacted or the formalities of corporate governance, as he left the business arrangements to Ms. Sarmov. GX 1 at 97, 100. At his deposition in April 2001, Dr. Kutty said he owned 100% of all of the companies, and his wife had no ownership interest except that some of the Florida clinics were owned together by tenancy in the entirety. GX 1 at 57-68. He understood from Ms. Sarmov that a doctor had to own the corporations operating the Tennessee clinics under Tennessee law. GX 1 at 59. By the time he testified at hearing (December 5, 2001), he said that some of the Florida clinics had been taken over by other doctors. Tr. at 2767. All of the Tennessee operations, however, had closed.

The following chart shows how the employers of the H-1B employees were identified on H-1B petitions, LCAs, and employment agreements, and which entities issued paychecks and W-2s:

Entities	H-1B petitions	LCAs	Employment agreements	Paychecks	W-2's
Sumeru Health Care Group		Chicos Speil			

Entities	H-1B petitions	LCAs	Employment agreements	Paychecks	W-2's
Sumeru Health Care Group, Inc.	Ilie Ionescu	Ilie Ionescu Venkatesh		Ahmed Casis Chicos Chintalapudi Haque Ilie Ionescu Kanagasegar Khan Manole Naseem Qadir Rohatgi Speil Venkatesh	Khan
Sumeru Health Care Group, Inc. (TN)			Chintalapudi Khan Venkatesh Ilie Ionescu		
Sumeru Health Care Group, L.C. d/b/a [The][37] Center for Internal Medicine and Pediatrics, Inc.			Ahmed Chicos Haque Ilie Ionescu Naseem Qadir Speil		

[37]The word "The" is in brackets here and below because its inclusion or exclusion appears to be inadvertent, and not meant to distinguish between two different entities. *See, e.g.*, Ahmed's Employment Agreement, GX 11 at 8 and 15, and Manole's Employment Agreement, GX 20 at 10 and 13.

Entities	H-1B petitions	LCAs	Employment agreements	Paychecks	W-2's
Center for Internal Medicine and Pediatrics, Inc.	Ahmed Chintalapudi	Ahmed Munteanu Venkatesh	Kanagasegar[38]	Chicos Manole Speil	Chintalapudi Ilie Ionescu Khan
Sumeru Health Care Group, L.C. d/b/a [The] Center for Internal Medicine and Pediatrics, P.C.			Casis Manole Munteanu Radulescu Rohatgi		
Center for Internal Medicine and Pediatrics, P.C.	Casis Haque Kanagasegar Manole Munteanu Naseem Radulescu Rohatgi	Casis Haque Kanagasegar Manole Naseem Radulescu	Kanagasegar[39] Munteanu	Ilie Ionescu	Chicos Chintalapudi Haque Ilie Ionescu Khan Manole Naseem Qadir Rohatgi Speil Venkatesh
Sumeru Health Care Group L.C. d/b/a Center for Internal Medicine and Pediatrics	Chicos Speil				

[38]"Center for Internal Medicine and Pediatrics, Inc., P.C." GX 18 at 9.

[39]"Center for Internal Medicine and Pediatrics, Inc., P.C." GX 18 at 9.

Entities	H-1B petitions	LCAs	Employment agreements	Paychecks	W-2's
Sumeru Health Care Group d/b/a Center for Internal Medicine and Pediatrics	Khan Qadir Venkatesh	Khan			
Center for Internal Medicine and Pediatrics		Chintalapudi	Chicos Manole		
Center for Internal Medicine		Qadir Rohatgi			
Ctr Int Med/ Tennessee					Khan

The record contains public records of various corporate entities from Florida and Tennessee. GX 2 - GX 6. No internal corporate records such as minutes or financial records were introduced into evidence. Other evidence about how the entities operated comes from the testimony of the witnesses, most of which is recounted above.

"Sumeru Health Care Group, Inc.," was incorporated in Florida effective January 1, 1998, with Mohan Kutty as President. Articles of Dissolution were filed in April 1998, but revoked in May 1998. The purpose of the corporation listed in the Articles of Incorporation was to "engage in any activity or business permitted under the laws of the United States and of the State of Florida." Annual reports filed in 1998, 1999 and 2000 showed Mohan Kutty and Sheela Kutty as the Directors. GX 5.

A second corporation named "Sumeru Health Care Group, Inc." was incorporated in Tennessee about the same time as the Florida corporation. A change of address notice in 1999 changed the mailing address of the Tennessee corporation from Bolivar, Tennessee to Hudson, Florida, and showed the officers and directors to be Dr. and Mrs. Kutty. The Tennessee corporation was dissolved effective September 15, 2000. GX 2.

"Sumeru Health Care, Inc." issued paychecks for 15 of the 17 doctors involved in this case (all except Munteanu and Radulescu, who never started work), before and after the Tennessee corporation by the same name dissolved. "Sumeru Health Care, Inc." was the corporate entity identified on other documents such as a W-2 for Dr. Khan, H-1B petitions for Drs. Ilie and Ionescu, and LCAs for Drs. Ilie, Ionescu and Venkatesh. "Sumeru Health Care Group, Inc. (TN)" was identified as the employer in the employment agreements with Drs.

Chintalapudi, Ilie, Ionescu, Khan and Venkatesh.

Another corporation with a similar name,"Sumeru Health Care Group, L.C.," was also established in Florida, in April 1998.[40] It was a limited liability corporation whose purposes included "to engage in the practice of medicine . . . to own and operate a medical clinic . . . to furnish related laboratory and clinical services . . ." Members identified in the Articles of Incorporation included four corporations with six Florida addresses, The Center for Internal Medicine, Inc. and Professional Center for Internal Medicine, Inc., in Hudson, Florida; Scunzianno & Associates Medical Center, Inc., in Springhill, Florida; and The Center for Internal Medicine and Pediatrics, Inc., in Inverness, Bradenton and Palmetto, Florida. Annual reports for 1999 and 2000 listed the same members.[41] GX 6. In a letter to the INS from Dr. Kutty dated December 14, 1998, regarding Chintalapudi's H-1B petition, Dr. Kutty stated:

> With this letter I hereby confirm that Center for Internal Medicine and Pediatrics, located at . . . Maynardville is a subsidiary company of Sumeru Health Care Group, L.C. I also declare that I am the Medical Director of both medical companies.

GX 78 at 11. The letters Dr. Kutty submitted in support of the H-1B petitions for Dr. Chicos and Dr. Speil identified their potential employer as Sumeru Health Care Group, L.C., d/b/a Center for Internal Medicine and Pediatrics, Inc. ("CIMP"), and stated, "Established in 1998, CIMP operates medical primary care facilities in Florida and Tennessee. CIMP is a Tennessee corporation employing 9 individuals." GX 13 at 34; GX 26 at 28. Dr. Kutty's letter to the Tennessee Department of Health in support of Dr. Speil's J1 waiver identified the employer the same way. GX 49. The cover letter which accompanied the H-1B petition on behalf of Dr. Manole was written on stationery for Sumeru Health Care Group, L.C. d/b/a Center for Internal Medicine and Pediatrics, Inc., in Hudson, Florida. It identified the petitioner as follows:

> SUMERU HEALTH CARE GROUP, L.C. D/B/A CENTER FOR INTERNAL MEDICINE AND PEDIATRICS, P.C. has several clinics throughout Florida and Tennessee which provide primary care . . . services to the community. The Center is about to open a clinic in Sneedville, Hancock County, which is designated as Health Professional Shortage Area due to an acute shortage of primary care physicians. . . .

GX 20 at 18. "Sumeru Health Care Group, L.C., doing business as the Center for Internal Medicine and Pediatrics, Inc.," was listed as the employer in employment agreements with Drs. Ahmed, Chicos, Haque, Ilie, Ionescu, Naseem Qadir and Speil. The LCAs for Drs. Chicos and Speil listed the employer as "Sumeru Health Care Group" without either designation, "Inc." or "L.C." As these examples show, various documents signed by Dr. Kutty have confused the issue

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[40]"Sumeru Health Care Group, L.C.," was not named as a respondent by the Administrator, apparently because it was not listed as the employer on any of the LCAs.

[41]There is no further evidence in the file regarding the Florida corporations known as "Center for Internal Medicine and Pediatrics, Inc." Dr. Kutty testified that he thought they were separately incorporated with the name of the city included in the name of the corporations. GX 1 at 194-195.

of which corporate entities were acting as the H-1B doctors' employers. Nor can the actions of the Florida and Tennessee corporations using the name "Sumeru Health Care Group" be distinguished on the record before me.

Similar confusion exists with respect to the companies operating under the name "Center for Internal Medicine and Pediatrics." A Tennessee corporation called "Center for Internal Medicine and Pediatrics, Inc." was incorporated with a Maynardville address in July 1998. Dr. Gupta was listed as the registered agent; Dr. Kutty was listed as the incorporator. In May 1999, the charter was amended to re-name the entity "Center for Internal Medicine and Pediatrics, P.C." The purpose of the amendment was given to convert the general corporation into a professional corporation, the purpose of which was to render professional medical services through Tennessee licensed physicians. The annual report for 1999 changed the registered agent to Dr. Chintalapudi, and listed Dr. Kutty as the only officer. The 2000 annual report listed Dr. and Mrs. Kutty as the officers and directors. GX 3. LCAs identified "Center for Internal Medicine and Pediatrics, Inc." as the employer for Drs. Ahmed, Munteanu and Venkatesh; "Center for Internal Medicine and Pediatrics, P.C." as the employer for Casis, Haque, Kanagasegar, Manole, Naseem and Radulescu; "Sumeru Health Care Group d/b/a Center for Internal Medicine and Pediatrics" as the employer for Khan; "Center for Internal Medicine and Pediatrics" as the employer for Chintalapudi; and "Center for Internal Medicine" as the employer for Qadir and Rohatgi. The Center for Internal Medicine and Pediatrics, "Inc." or "P.C.," issued W-2s for at least 12 of the 17 doctors, and were identified as employers on 10 H-1B petitions. As noted above, in correspondence with the INS, the Center for Internal Medicine and Pediatrics was given as an operating name in Tennessee for Sumeru Health Care Group, L.C., the Florida limited corporation.

Yet another entity, Maya Health Care, was identified during the hearing. Its name did not appear on any of the documents submitted in connection with the H-1B program requirements, and none of the incorporation documents are in evidence.[42] Maya Health Care was named as the employer in termination letters to Drs. Chicos, Haque, Ilie, Ionescu, Khan, Qadir and Speil in March 2001. Dr. Kutty testified that Maya Health Care, L.C., was a limited liability corporation formed as an umbrella for Sumeru Health Care, Inc. in Florida and the Center for Internal Medicine and Pediatrics in Maynardville on the advice of Ms. Sarmov. GX 1 at 55. He said it was used in the termination letters because they were in the process of changing the company name when the letters were sent. GX 1 at 241.

Under Tennessee law,

> Conditions under which the corporate entity will be disregarded vary according to the circumstances present in the case, and the matter is particularly within the province of the Trial Court. . . .
>
> The separate identity of a corporation may be disregarded upon a showing that it is a

[42]It probably came into existence sometime in 2000, as Dr. Manole testified that he arranged to have the utilities for the Sneedville clinic billed to Maya Health Care on instructions from Florida. Tr. at 588. The Sneedville clinic opened in June 2000.

> sham, or dummy or where necessary to accomplish justice. The principle of piercing the corporate veil is to be applied with great caution and not precipitately, since there is a presumption of corporate regularity. Each case involving disregard of the corporate entity must rest upon its special facts. Generally no one factor is conclusive. . . .
>
> Corporate veils are pierced– that is–the legal entity is disregarded and the true owners of the entity are held liable when the corporation is liable for a debt but is without funds due to some misconduct on the part of the officers and directors. . . .
>
> If separate corporations are designed or used as a means of defrauding creditors, their acts should be carefully scrutinized. . . .
>
> In an appropriate case and in furtherance of the ends of justice, a corporation and the individual or individuals owning all of its stock will be treated as identical. . . .

Muroll Gesellschaft M.B.H. v. Tennessee Tape, Inc., 908 S.W.2d 211, 213 (Tenn. Ct. App. 1995) (citations omitted). In that case, the court went on to hold that the testimony of the sole shareholder of the defendant company showed that it had transferred assets to another of his solely-owned companies without consideration, rendering the defendant company unable to pay its debts, and enabling the owner's salary to double, justified piercing the corporate veils. In the present case, it now appears likely that none of the corporate entities named as respondents will have assets with which to pay the back wages and penalties assessed. Some factors to be considered in the decision whether to pierce the corporate veil in order to reach an individual owner's assets to satisfy corporate debts include

> whether the corporation was grossly undercapitalized, the nonissuance of stock certificates, the sole ownership of stock by one individual, the use of the corporation as an instrumentality or business conduit for an individual or another corporation, the diversion of corporate assets by or to a stockholder or other entity to the detriment of creditors, the use of the corporation as a subterfuge in illegal transactions, the formation and use of the corporation to transfer to it the existing liability of another person or entity, and the failure to maintain arms length relationships among entities. *Emergicare Consultants, Inc.*, 2000 WL 1897350, at *2 [(Tenn. Ct. App. 2000)] (citing *Federal Deposit Ins. Corp. v. Allen*, 584 F.Supp. 386 (E.D. Tenn. 1984)).

VP Buildings, Inc., v. Polygon Group, Inc., 2002 WL 1564, at *5 (Tenn. Ct. App. 2002). In the *Federal Deposit Ins. Corp.* case relied on by the Tennessee courts, the District Court held corporate officers personally liable for corporate indebtedness where a loan was part of a three-year course of fraudulent conduct circumventing federal banking laws and regulations pertaining to insider loans. In so holding, after listing the factors to be considered in deciding whether to pierce the corporate veil, the Court stated:

> In addition, when a corporation is dominated by an individual or individuals not only as to finance but also as to policy and business practices so that the corporation has no mind, will, or existence of its own and this domination is used to commit a wrong, or fraud or perpetrate a violation of statutory or positive legal duty, the corporate veil will be pierced.

584 F.Supp. at 397-398 (citation omitted).

Most of these factors are present in the case at hand. The Tennessee corporations were undercapitalized and Dr. Kutty intended to and did support them with funds from his Florida operations, at least until they, too, ran into cash flow problems. He could not state how much money was used to start the clinics, or whether money was contributed as capital or loans. There is no evidence that stock certificates were issued for any of the corporations, and Dr. Kutty was the sole owner of them all. Dr. Kutty had sole control over the corporate entities who submitted the LCAs and nominally employed the doctors, as well as some or all of the Florida companies in which he was involved. His office and the offices for Sumeru Health Care Group and the various Centers for Internal Medicine and Pediatrics were located in the same facility in Hudson, Florida. Billing and other administrative functions for all of the corporations controlled by Dr. Kutty were centralized. Although his wife was listed as a director in some corporate records, Dr. Kutty testified that he made all decisions regarding the companies. The assets of the various corporations were interchangeable, and dealings were not at arms' length.

It is apparent from Dr. Kutty's own testimony that he alone owned, controlled and operated all of the named corporations, and freely treated and shared personal and corporate assets as his own. *See* Tr. at 2739-2742, 2766-2772; GX 1 at 14, 58. Dr. Kutty could not say what his income has been in recent years. He said he does not read his tax returns, but assumes his accountant has the completed them properly. GX 1 at 90. Dr. Kutty testified that he does not have any personal assets. His house is owned jointly with his wife. GX 1 at 138. He has no savings accounts, checking accounts, credit cards, stock portfolio or foreign assets. His wife handles housekeeping expenses, and gets cash from the office to give to him. GX 1 at 138-142. His wife takes a salary of about $50,000, and Dr. Kutty is supposed to get $100,000 per year, although he has not received his salary for the past two or three years. Instead he has received about $50,000 per year in pay-backs for loans he has made to his Florida companies. GX 1 at 84-85, 89-90.

Dr. Kutty never intended to pay the H-1B doctors the required wages, and willfully violated that and other requirements of the INA. The companies which submitted the LCAs in this case have gone out of business in Tennessee and, it appears, may have no assets to pay either the back wages or the civil money penalties. To the extent that the Tennessee clinics could have continued to operate and generate income and salaries based on the doctors' work, that possibility was foreclosed by Dr. Kutty's illegal action of terminating the doctors in retaliation for engaging in protected activity. The corporate entities were a sham, and piercing the veil is necessary to do justice for the H-1B employees. Like the corporations in the *Federal Deposit Ins. Corp.* case above, Dr. Kutty's corporations had no mind, will, or existence of their own, and his domination was used to perpetrate violations of statutory duties. Like the corporate officers held personally liable for a three-year course of fraudulent conduct under federal banking laws, Dr. Kutty should be personally liable to pay the back wages and civil money penalties due for his three-year course of fraudulent activity under the INA. In addition, Dr. Kutty should be debarred from approval of H-1B petitions for at least two years pursuant to 8 U.S.C. § 1182(n)(2)(C)(ii) and 20 CFR §§ 655.810(d) and 655.855 (2002).

2. Dr. Kutty as the Employer

The INA requires the employer to submit the LCA and to meet the conditions set by the statute; requires the employer to maintain records for public inspection; and prohibits the employer from discriminating against employees for engaging in protected activities. The Administrator maintains that Dr. Kutty was the employer of the 17 doctors because he had an "employment relationship" with the doctors based on the current regulations, which state:

> *Employed, employed by the employer, or employment relationship* means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. . . .
>
> *Employer* means a person, firm, corporation, contractor, or other association or organization in the United States which has an employment relationship with H-1B nonimmigrants . . . The person, firm, contractor, or other association or organization in the United States which files a petition on behalf of an H-1Bnonimmigrant is deemed to be the employer of that H-1B nonimmigrant.

20 CFR § 655.715 (2002). *See* the Administrator's pre-hearing brief at 10-12, and the post-hearing brief at 147-150. The definitions in effect under the previous regulation contained only the following definition of employer:

> *Employer* means a person, firm, corporation, contractor, or other association or organization in the United States:
>
> (1) Which suffers or permits a person to work within the United States;
>
> (2) Which has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee; and
>
> (3) Which has an Internal Revenue Service tax identification number.

20 CFR § 655.715 (1995). Based on the evidence of record in this case, Dr. Kutty, individually, meets all the requirements of both definitions, except that the record is silent whether he has an Internal Revenue Service tax identification number.

Respondents argued that Dr. Kutty signed documents only as the President and Medical Director of the corporations, and not in his individual capacity, so the corporations, and not Dr. Kutty, were the employer. Respondents also suggested that the doctors were not "employees" because they "controlled their own lives and their own practices." Respondents' pre-hearing brief at 9. There is no real issue in this case whether the doctors in this case were employees. A potential employer filed LCAs and applications for H-1B visas on their behalf. They signed employment agreements with and were hired, and in some cases, fired, by an employer. The issue of whether Dr. Kutty, as an individual, can be considered to be their employer, is just another way to cast the issue addressed above in the context of piercing the corporate veil. In the ordinary course of events, the individual signing the LCA and H-1B petitions on behalf of a

corporation would not be considered to be the employer in his or her individual capacity. Based on the particular facts of this case, however, I conclude that the Administrator's view that Dr. Kutty was the employer is a reasonable interpretation of the regulations. A holding otherwise would prevent any recovery of back wages and civil money penalties, and allow Dr. Kutty to continue employing H-1B employees, rendering impossible debarment pursuant to 8 U.S.C. § 1182(n)(2)(C)(ii) and 20 CFR §§ 655.810(d) and 655.855 (2002).

I conclude that in addition to the corporate Respondents, Dr. Kutty should be held individually responsible as an employer for the violations of the statute and regulations he committed.

ORDER

IT IS THEREFORE ORDERED that Respondents shall pay back wages to the following persons in the specified amounts:

Dr. Nazeen Ahmed	$64,418.75
Dr. Ferdinand Casis	$24,962.02
Dr. Alexandru Chicos	$69,623.71
Dr. Srinivasa Chintalapudi	$97,174.27
Dr. Ahsanul Haque	$26,065.43
Dr. Ionut Ilie	$25,690.09
Dr. Madalina Ionescu	$30,242.90
Dr. Sivalingam Kanagasegar	$14,002.67
Dr. Rafay Khan	$138,543.85
Dr. Victor Manole	$81,204.09
Dr. Dragos Munteanu	$41,432.91
Dr. Shoaib Naseem	$69,841.66
Dr. Maqbool Qadir	$109,217.83
Dr. Vlad Radulescu	$26,149.35
Dr. Rajesh Rohatgi	$24,901.81

Dr. Christian Speil	$97,555.00
Dr. Vivek Venkatesh	$103,267.70

IT IS FURTHER ORDERED that Respondents shall pay civil money penalties to the Wage and Hour Division in the amount of $108,800.00.

ALICE M. CRAFT
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR § 655.845, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within 30 calendar days of the date of the Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge.