



In the Matter of:

**UNITED STATES DEPARTMENT
OF LABOR, ADMINISTRATOR,
WAGE & HOUR DIVISION,
EMPLOYMENT STANDARDS
ADMINISTRATION,**

ARB CASE NO. 03-022

**ALJ CASE NOS. 01-LCA-010
through
01-LCA-025**

PROSECUTING PARTY,

DATE: May 31, 2005

v.

**MOHAN KUTTY, M.D. d/b/a THE
CENTER FOR INTERNAL MEDICINE
AND PEDIATRICS, INC., ET AL.,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

Steven J. Mandel, Esq., Paul L. Frieden, Esq., Carol B. Feinberg, Esq., *United States
Department of Labor, Washington, D.C.*

For the Respondents:

Ramon Carrion, Esq., John Pukas, Esq., *Ramon Carrion, P.A., Carrion Immigration
Law Group, Clearwater, Florida,* and Angelo A. Paparelli, Esq., Liane M. Jarvis,
Esq., *Paparelli & Partners LLP, Irvine, California*

For Certain Alien Doctors:

Robert C. Divine, Esq., Alison L. Tuley, Esq., *Baker, Donelson, Bearman, Caldwell
& Berkowitz, P.C., Chattanooga, Tennessee*

FINAL DECISION AND ORDER

The Immigration and Nationality Act (INA or the Act)¹ requires that employers pay a certain, prescribed wage to the nonimmigrant alien workers whom they hire. The Act also prohibits employers from discriminating when the workers engage in certain activities. The Administrator of the United States Department of Labor's Wage and Hour Division contends that Dr. Mohan Kutty and various corporations he owned and operated violated the Act when they did not pay foreign doctors they had hired and later discriminated against them. A Department of Labor (DOL) Administrative Law Judge (ALJ) ruled in favor of the Administrator and the doctors. Kutty and the corporations appealed. We affirm the ALJ's decision.

BACKGROUND

The INA permits employers to hire nonimmigrant alien workers in specialty occupations in the United States. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b). These workers commonly are referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the specialty. 8 U.S.C.A. § 1184(i)(1). To employ H-1B nonimmigrants, the employer must first fill out a Labor Condition Application (LCA). 8 U.S.C.A. § 1182(n). The LCA stipulates the wage levels that the employer guarantees for the H-1B nonimmigrants. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 655.732. The LCA states that the alien will be paid the greater of either the actual wage level the employer paid to all other individuals with similar experience and qualifications for the specific employment in question or the prevailing wage level for the occupational classification in the area of employment. 8 U.S.C.A. § 1182(n)(1)(A)(i)(I)-(II). The employer then obtains certification from the DOL that it has filed the LCA with DOL. After it secures the certified LCA, the employer submits a copy to the Immigration and Naturalization Service (INS) and petitions for an H-1B classification for the nonimmigrants it wishes to hire. Upon INS approval, the United States Department of State issues H-1B visas to the nonimmigrants. 20 C.F.R. § 655.705(b).²

Kutty owned health care clinics in Florida and decided to open clinics in rural areas of Tennessee in 1998. Between 1998 and 2000, Kutty opened five clinics in Tennessee and hired 18 medical doctors to run the clinics, 17 of whom were nonimmigrant aliens. The doctors signed employment contracts with Kutty that were contingent upon their obtaining medical licenses to practice in Tennessee. Each of the doctors held J1 visas. J1 visa holders are entitled to enter the United States in order to receive graduate medical education or training, but, after finishing their education or training, must return to their home country for two years before becoming eligible to apply for an immigrant or nonimmigrant visa or for permanent residence. 8 U.S.C.A. § 1182(e). A J1 visa holder may obtain a waiver of the two-year foreign residence

¹ 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2004).

² The INS is now the "U.S. Citizenship and Immigration Services" or "USCIS." See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002).

requirement if an interested State agency makes such a request on his or her behalf. To qualify, the alien must show that he or she has an employment agreement to practice primary care or specialty medicine for at least three years in a geographic area that the Secretary of Health and Human Services has designated as a having a shortage of health care professionals. 8 U.S.C.A. § 1184(l)(1)(B), (D)(ii). Upon receiving a J1 waiver, the nonimmigrant alien is then eligible to obtain an H-1B visa.

All 17 doctors obtained J1 waivers, and Kutty, as the medical director of the various employing corporations named on the LCAs, signed and filed the LCAs. In addition, Kutty also signed and filed H-1B visa petitions on their behalf. Eventually the doctors received H-1B visas.

Late in 2000, Kutty's clinics experienced financial difficulties, and in January 2001, Kutty began to cut some of the doctors' salaries. Eight of these doctors hired an attorney, Robert C. Divine, who wrote a letter to Kutty on February 14, 2001. Divine demanded payment of the salary amounts that were past due. GX 33. If Kutty did not make such payments, Divine stated that he would pursue other remedies on behalf of the doctors, including notifying the DOL of Kutty's noncompliance with the terms of the doctors' LCAs. Divine also informed Kutty that he was prohibited from discriminating against the doctors for complaining about INA violations.

After receiving Divine's letter, Kutty stopped paying the eight doctors that Divine represented. Consequently, on February 28, 2001, Divine filed a complaint on their behalf with the DOL. Shortly after the Administrator began to investigate this complaint, Kutty fired seven of the ten doctors who Divine represented.

The Administrator determined that, in the case of each of the 17 doctors, Kutty violated the INA by willfully failing to pay the required wage. She also found that Kutty had failed to make available LCAs and other necessary documentation and failed to maintain payroll records. As a result, the Administrator ordered Kutty to pay back wages and assessed civil money penalties. The Administrator also determined that Kutty discriminated against nine of the doctors when he terminated their employment because they engaged in protected conduct. Therefore, she also assessed civil money penalties for these violations. Kutty appealed the Administrator's decision and the cases were assigned to a Department of Labor Administrative Law Judge (ALJ) for hearing. The ALJ consolidated the 17 cases.

The ALJ concluded that Kutty violated the Act when he willfully failed to pay the doctors their required wages. She also concluded that Kutty must reimburse the doctors for the J1 waiver and H-1B visa fees and costs they had paid. With some minor adjustments, the ALJ adopted the Administrator's calculations of the back wages and reimbursements. The ALJ further concluded that Kutty discriminated against nine of the doctors for engaging in protected activity. The ALJ adopted the Administrator's civil money penalty calculations. Furthermore, the ALJ found that the circumstances justified piercing the corporate veil and holding Kutty personally liable for the back wages and the

civil money penalties. In addition, the ALJ concluded that Kutty should be debarred from employing aliens. Kutty timely filed a petition for review. See 20 C.F.R. § 655.655.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB or the Board) has jurisdiction to review an ALJ's decision. 8 U.S.C.A. § 1182(n)(2) and 20 C.F.R. § 655.845. See also Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

Under the Administrative Procedure Act, the Board, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision" 5 U.S.C.A. § 557(B) (West 1996), quoted in *Goldstein v. Ebasco Constructors, Inc.*, 1986-ERA-36, slip op. at 19 (Sec'y Apr. 7, 1992). The Board reviews the ALJ's decision de novo. *Yano Enters., Inc. v. Administrator*, ARB No. 01-050, ALJ No. 2001-LCA-0001, slip op. at 3 (ARB Sept. 26, 2001); *Administrator v. Jackson*, ARB No. 00-068, ALJ No. 1999-LCA-0004, slip op. at 3 (ARB Apr. 30, 2001). See generally *Mattes v. United States Dep't of Agric.*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (rejecting argument that higher level administrative official was bound by ALJ's decision); *McCann v. Califano*, 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's decision by higher level administrative review body).

ISSUES

Six issues are relevant in deciding this appeal.

1. Are the DOL and the INS liable to the doctors because they approved the LCAs and H-1B petitions that Kutty filed for the doctors?
2. Are the doctors entitled to back wages and certain reimbursements? If so, did the ALJ properly calculate those amounts?
3. Did Kutty discriminate against nine doctors for engaging in protected activity?
4. Is Kutty liable for civil money penalties, and, if so, did the ALJ properly calculate the amount?
5. Should Kutty be personally liable for the back wages and civil money penalties?
6. Should Kutty be debarred from employing nonimmigrant aliens for two years?

DISCUSSION

1. Government Culpability for Approving LCAs and H-1B Petitions

Kutty contends that the ALJ erred in not finding that the DOL and the INS are liable for the back wages and penalties because they approved defective LCAs and H-1B visa petitions that Kutty filed on behalf of the doctors.

DOL Culpability

The DOL's Employment and Training Administration (ETA) reviews and approves LCAs unless it finds that the application is "incomplete or obviously inaccurate." 8 U.S.C.A. § 1182(n)(1)(G)(ii); 20 C.F.R. § 655.730(b). Kutty, as the medical director for the various corporations listed as "employer" on the LCAs, signed and filed the LCAs for all the H-1B nonimmigrant doctors.³ See also GX 1 at 171. The LCAs listed various prevailing annual wage rates for the doctors, ranging from \$115,357 to \$52,291. Kutty also signed individual employment agreements with the H-1B nonimmigrant doctors, who were primarily internists, but also included pediatricians, a cardiologist, a rheumatologist and primary care physicians.⁴ See also GX 1 at 171. Nevertheless, each employment agreement provided for an annual salary of \$80,000.

Kutty contends that because the salary listed in the employment agreements was less than the prevailing wage rates listed on the doctors' LCAs, ETA should not have certified the LCAs because they were "incomplete or obviously inaccurate." But, in fact, only 10 of the 17 H-1B nonimmigrant doctors' employment agreement salaries were less than the prevailing wage rates listed on their corresponding LCAs. Furthermore, an H-

³ LCAs for the following 17 H-1B nonimmigrant doctors are contained in the record: 1) Dr. Ahmed, GX 11 at 5 and GX 11A at 2; 2) Dr. Casis, GX 12 at 5; 3) Dr. Chicos, GX 13 at 8-9; 4) Dr. Chintalapudi, GX 14 at 5; 5) Dr. Haque, GX 15 at 11 and 40; 6) Dr. Ilie, GX 16 at 9 and 35; 7) Dr. Ionescu, GX 17 at 11 and 35; 8) Dr. Kanagasegar, GX 18 at 5; 9) Dr. Khan, GX 19 at 11; 10) Dr. Manole, GX 20 at 5; 11) Dr. Munteanu, GX 21 at 5; 12) Dr. Qadir, GX 23 at 1-11; 13) Dr. Venkatesh, GX 27 at 38; 14) Dr. Speil, GX 26 at 10-11; 15) Dr. Naseem, GX 22 at 14; 16) Dr. Radulescu, GX 24 at 5-6 and 32; 17) Dr. Rohatgi, GX 25 at 1-11.

⁴ Employment agreements for the following 17 H-1B nonimmigrant doctors are contained in the record: 1) Dr. Ahmed, GX 11 at 8; 2) Dr. Casis, GX 12 at 12; 3) Dr. Chicos, GX 13 at 18-22; 4) Dr. Chintalapudi, GX 14 at 10-16; 5) Dr. Haque, GX 15 at 20-27; 6) Dr. Ilie, GX 16 at 15-22; Respondent's Exhibit (RX) 68; 7) Dr. Ionescu, GX 17 at 17-24; RX 68; 8) Dr. Kanagasegar, GX 18 at 9-17; 9) Dr. Khan, GX 19 at 21 and 29; 10) Dr. Manole, GX 20 at 10-17; 11) Dr. Munteanu, GX 21 at 11-18; 12) Dr. Qadir, GX 23 at 16-21; RX 86; 13) Dr. Venkatesh, GX 27 at 22-26b, 27-28; 14) Dr. Speil, GX 26 at 18-28; 15) Dr. Naseem, GX 22 at 18-25; 16) Dr. Radulescu, GX 24 at 17-23; 17) Dr. Rohatgi, GX 25 at 19-26.

1B employer is not required to file employment agreements with DOL but only the LCA form itself, and, as the ALJ found, Kutty did not prove that he submitted the employment agreements to ETA. D. & O. at 75. And most importantly, in signing the LCAs, Kutty declared under penalty of perjury that the information provided on the forms is “true and correct” and that “I will comply with [DOL] regulations governing this program.” See 20 C.F.R. § 655.730(c). Specifically, Kutty checked the box indicating that he would pay the higher of the actual wage or the prevailing wage. See 8 U.S.C.A. § 1182(n)(1)(A)(i)(I)-(II); 20 C.F.R. §§ 655.730(d)(1)(i)-(ii), 655.731(a).

As both the ALJ and the Administrator point out, the “DOL is not the guarantor of the accuracy, truthfulness or adequacy of a certified” LCA. 20 C.F.R. § 655.740(c); D. & O. at 6. Consequently, we reject Kutty’s contention that ETA should not have certified the LCAs because the salaries specified in the employment agreements did not correspond with the prevailing wage rates listed on the LCAs.

Kutty also argues that DOL should not have certified the LCAs because the prevailing wage rate listed on some of the doctors’ LCAs was less than the highest prevailing wage rate found on other doctors’ LCAs. Kutty’s contention echoes Divine’s argument of on behalf of ten doctors. Divine argues that because some of the LCAs listed a prevailing annual wage rate of \$115,357, all 17 of the H-1B nonimmigrant doctors were entitled to an annual wage rate of \$115,357, as that wage rate reflected the actual wage level that Kutty paid other doctors with similar qualifications. See D. & O. at 15; Brief of Certain Doctors at 2.

Contrary to this contention, the “actual wage level” under the INA is that “paid by the employer” to similarly qualified individuals “as of the time of filing” the LCA. 8 U.S.C.A. § 1182(n)(1)(A)(i)(I)-(II); D. & O. at 69. Since Kutty had not employed or paid any physicians in Tennessee prior to opening his clinics and filing the LCAs, and since not all 17 of the H-1B nonimmigrant doctors possessed the same qualifications or specialties, all of the doctors were not entitled to the same wage. Thus, we reject the argument that the “actual wage level” became \$115,357 for each doctor because some of the LCAs listed a prevailing annual wage rate of \$115,357.

INS Culpability

Similarly, Kutty contends that the INS erred in approving the H-1B petitions that he filed on behalf of the doctors. Kutty argues that since the petitions did not clearly indicate his intention to pay the greater of the actual or prevailing wage, they should not have been approved. Kutty Brief at 13. In signing each of the petitions, however, Kutty specifically agreed to the terms of the doctors’ LCAs, and the LCAs indicate that the doctors would be paid the higher of the actual or prevailing wage.⁵ GX 1 at 171; 8

⁵ H-1B petitions for the following 17 H-1B nonimmigrant doctors are contained in the record: 1) Dr. Ahmed, GX 11A at 12; 2) Dr. Casis, GX 12 at 11; 3) Dr. Chicos, GX 13 at 17; 4) Dr. Chintalapudi, GX 14 at 9; 5) Dr. Haque, GX 15 at 18; 6) Dr. Ilie, GX 16 at 14; 7) Dr.

U.S.C.A. § 1182(n)(1)(A)(i)(I)-(II); 20 C.F.R. §§ 655.730(d)(1)(i)-(ii), 655.731(a). Thus, we reject Kutty's argument.

Kutty also argues that the INS should not have approved the H-1B petitions because they did not contain evidence that the doctors had obtained a state (i.e. Tennessee) medical license as INS regulations require. *See* 8 C.F.R. § 214.2(h)(4)(viii)(A)(1) (2004). In this regard, he points out that each of the doctors had employment agreements that were contingent upon the doctors eventually obtaining Tennessee medical licenses at the time their H-1B petitions were filed. Kutty Brief at 8-9.

But, under its "no benching" provisions, the Act itself, in unambiguous language, requires that an employer pay the required wage even if the H-1B nonimmigrant is in a nonproductive status because of "lack of a permit or license." 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(6)(ii), (7)(i); *Rajan v. In'l. Bus. Solutions, Ltd.*, ARB No. 03-104, ALJ No. 03-LCA-12, slip op. at 7 (ARB Aug. 31, 2004).⁶ Furthermore, as the ALJ noted, Tennessee does not grant a medical license until a nonimmigrant doctor has obtained a valid visa.⁷ D. & O. at 75.

Although the INS regulations require that an H-1B petition contain evidence that a physician have a state medical license, the INS approved these petitions. Furthermore, the INS approved them even though Kutty had informed the agency, when filing H-1B petitions on behalf of Drs. Casis, Manole, Naseem and Radulescu, that their applications to obtain Tennessee medical licenses were pending. *See* GX 12 at 30, GX 20 at 18, GX

Ionescu, GX 17 at 16; 8) Dr. Kanagasegar, GX 18 at 8; 9) Dr. Khan, GX 19 at 18; 10) Dr. Manole, GX 20 at 8; 11) Dr. Munteanu, GX 21 at 10; 12) Dr. Qadir, GX 23 at 15; 13) Dr. Venkatesh, GX 27 at 21; 14) Dr. Speil, GX 26 at 16; 15) Dr. Naseem, GX 22 at 16-17; 16) Dr. Radulescu, GX 24 at 12; 17) Dr. Rohatgi, GX 25 at 17.

⁶ Contrary to Kutty's assertion, the ALJ did not apply the "no benching" provisions contained in the former regulations implementing the INA. *See* 20 C.F.R. § 655.731(c)(5)(i) (1995). The Administrator had been enjoined from enforcing those regulations. *See National Ass'n of Mfrs. v. United States Dep't of Labor*, 1996 WL 420868 (D.D.C. 1996). The ALJ correctly noted that those provisions were subsequently codified into the statute itself by the amendments contained in the American Competitiveness and Workforce Improvement Act (ACWIA) of 1998, Title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999 (P.L. 105-277, 112 Stat. 2681 (1998)). *See* 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 65 Fed. Reg. at 80169 (2000); D. & O. at 7 n.6.

⁷ Pursuant to Tennessee's relevant statute, persons applying to practice medicine in Tennessee must submit "[e]vidence of being legally entitled to live and work in the United States if not a citizen of the United States." *See* Tenn. Code Ann. § 63-6-207(a)(1)(E), (2)(E) (West 2005). Such evidence may include "current visa status." *See* R. of Tenn. Bd. of Med. Exam'rs, Ch. 0880-2, Gen. R. & Regs. Governing the Practice of Med., R. 0880-2-.04(8), R. 0880-2-.05(4) (Mar. 2005)(Rev'd).

22 at 46, GX 24 at 30. Therefore, though the medical license provision contained in the INS regulation is contrary to the “no benching” section of the INA, we conclude, like the ALJ, that INS interpreted the Act as permitting the issuance of an H-1B visa before a medical license is obtained. D. & O. at 70, 75; 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(6)(ii), (7)(i). The INS’s interpretation of the Act was reasonable under these circumstances and we must accord it deference. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See also United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (the reviewing court must not reject an agency interpretation simply because the court would have interpreted the statute otherwise); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (the principles of *Chevron* clearly apply to the INA statutory scheme, and judicial deference is particularly appropriate in the immigration context); *Espejo v. INS*, 311 F.3d 976, 978-979 (9th Cir. 2002); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1150 (9th Cir. 2000). Thus, we reject Kutty’s contention that the INS should not have approved the H-1B petitions because they did not contain evidence that the doctors had obtained Tennessee medical licenses.

To sum up, we find that Kutty voluntarily subjected himself to the requirements of the H-1B program by submitting LCAs and H-1B petitions on behalf of the nonimmigrant alien doctors. Because Kutty secured all the benefits available under the H-1B program, namely, the ability to employ nonimmigrant aliens, he is estopped from subsequently contending that the LCAs and H-1B petitions that he filed should not have been approved. *See Administrator v. Dallas VA Med. Ctr.*, ARB Nos. 01-077, 01-081, ALJ No. 98-LCA-3, slip op. at 4 (ARB Oct. 30, 2003); *Administrator v. Alden Mgmt. Serv., Inc.*, ARB Nos. 00-020, 00-021, ALJ No. 96-ARN-3, slip op. at 3 (ARB Aug. 30, 2002). *See also Johnson v. Georgia Dep’t of Human Res.*, 983 F. Supp. 1464, 1470 (N.D. Ga. 1996) (a party advocating two sharply contradictory positions “will not be permitted to ‘speak out of both sides of h[is] mouth with equal vigor and credibility before this court.’”) (*quoting Reigel v. Kaiser Foundation Health Plan*, 859 F. Supp. 963, 970 (E.D.N.C. 1994). *Cf. New Hampshire v. Maine*, 532 U.S. 742 (2001) (“[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.”) (*quoting Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).

2. Back Wage and Business Expense Calculations

The Back Wage Calculations

The Administrator and the ALJ determined that Kutty failed to pay the required wage rate to the H-1B nonimmigrant doctors. *See* 20 C.F.R. § 655.731(a). GX 30; D. & O. at 75. We agree with this finding because the record supports it. Furthermore, Kutty does not contest this finding but argues only as to the business expense portion of the back wages assessed against him. Kutty Brief at 17. Divine argues that the Administrator (and ALJ) erred as to the amount to which ten of the doctors are entitled.

The Administrator calculated the back wages as being “the difference between the amount that should have been paid and the amount that actually was paid.” 20 C.F.R. § 655.810(a), GX 7; 8A-Q; D. & O. at 75-76. In determining the amount that should have been paid, the Administrator used the prevailing wage rate that Kutty listed on the LCAs. On 12 of the LCAs, Kutty indicated that “SESA” (State Employment Security Agency) was the source for the prevailing wage rate listed. On the remaining LCAs, Kutty indicated the prevailing wage rate had been determined according to the Economic Research Institute survey, which, according to the Administrator, is considered to be another independent authoritative source for prevailing wage rates. Administrator’s Brief at 31. If Kutty used the Economic Research Institute rate, the Administrator properly used the average mean wage rate from the range of prevailing wage rates the survey listed. *See* 20 C.F.R. § 655.731(a)(2)(iii); 20 C.F.R. § 655.731(b)(3)(iii)(B)(1); D. & O. at 76. Except in two minor instances, the ALJ accepted the Administrator’s calculations of the back wages because the evidence supported those calculations. D. & O. at 76-83.⁸

On behalf of ten of the doctors, Divine contends that the Administrator and the ALJ erred in calculating the amount of back wages. Specifically, Divine argues that the Administrator erred in determining that the end date for the period for which they were owed back wages was either the date that Kutty fired them or the date that they left their jobs. Brief of Certain Alien Doctors at 2.

DOL regulations specify that wage payments “need not be made if there has been a *bona fide* termination of the employment relationship” and that “INS regulations require the employer to notify the INS that the employment relationship has been terminated so that the [H-1B] petition is canceled (8 C.F.R. 214.2(h)(11)).” *See* 20 C.F.R. § 655.731(c)(7)(ii). The applicable INS regulation provides that a H-1B petitioner, such as Kutty, shall “immediately” notify the INS if he “no longer employs the beneficiary,” *see* 8 C.F.R. § 214.2(h)(11)(i)(A) (2002), and provides for “automatic revocation” of a petition if the employer “goes out of business.” 8 C.F.R. § 214.2(h)(11)(ii). At the hearing, the ALJ determined that Kutty’s Tennessee clinics did not go out of business until December 2001, months after the ten H-1B nonimmigrant doctors had been fired or left their jobs with Kutty. HT at 2690, 2743. And the record contains no evidence that Kutty ever notified the INS that he had terminated the doctors or that the clinics had gone out of business.

In effect, Divine contends that since there was not a *bona fide* termination of the ten doctors’ employment and since the clinics did not go out of business until December

⁸ The ALJ adjusted the back wages that the Administrator calculated for Dr. Kanagasegar, GX 8H. She excluded wages for a month when Dr. Kanagasegar was working for another employer since the Administrator had not intended to include wages for that period. D. & O. at 79 n. 34. Similarly, the ALJ adjusted the back wages that the Administrator calculated for Dr. Manole, GX 8J, by excluding wages for the period before Dr. Manole’s H-1B was approved. *See* 20 C.F.R. § 655.731(c)(6)(ii); D. & O. at 80-81.

2001, the doctors are entitled to back wages up to the point when they found new employment with other employers. But since the Administrator is vested with “enforcement discretion” and considers the totality of circumstances “in fashioning remedies appropriate to the violation,” 65 Fed. Reg. at 80180 (2000), and since “the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate,” “including . . . back wages to workers . . . whose employment has been terminated in violation of these provisions,” 20 C.F.R. § 655.810(e)(2), we will not disturb the Administrator and ALJ’s calculations because they are neither arbitrary nor do they evidence an abuse of discretion.

The J1 Waiver and H-1B Visa Expenses

The Administrator and the ALJ also found that the doctors had paid fees for obtaining their J1 waivers and H-1B visas. Both the Administrator and the ALJ considered these fees to be employer business expenses and, therefore, determined that Kutty must reimburse the doctors for those expenses. GX 7, 8A-Q, 30; D. & O. at 70-72.

Pursuant to 20 C.F.R. § 655.731(c)(1) (1995) and (2001), “[t]he 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)(9) of this section may reduce the cash wage below the level of the required wage.” Subsection (c)(9)(ii), in turn, states that “[a]uthorized deductions, for purposes of the employer’s satisfaction of the H-1B required wage obligation” “may not recoup a business expense(s) of the employer (including attorney fees and other costs connected to the performance of the H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition).” 20 C.F.R. § 655.731(c)(9)(ii) (2001). *See also* 20 C.F.R. § 655.731(c)(7) (1995). “Where the employer depresses the employee’s wages below the required wage by imposing on the employee any of the employer’s business expense(s), the Department will consider the amount to be an unauthorized deduction from wages.” 20 C.F.R. § 655.731(c)(12) (2001); *see also* 20 C.F.R. § 655.731(c)(9) (1995).

The comments regarding the INA’s relevant implementing regulation at 20 C.F.R. § 655.731(c)(12) state:

An H-1B employer is prohibited from imposing its business expenses on the H-1B worker - including attorney fees and other expenses associated with the filing of an LCA and H-1B petition - only to the extent that the assessment would reduce the H-1B worker’s pay below the required wage, i.e., the higher of the prevailing wage and the actual wage. . . . Where a worker is required to pay an expense, it is in effect a deduction in wages which is prohibited if it has the effect of reducing an employee’s pay (after subtracting the amount of the expense) below the

required wage (i.e., the higher of the actual wage or the prevailing wage). . . . Any expenses directly related to the filing of the LCA and the H-1B petition are a business expense that may not be paid by the H-1B worker if such payment would reduce his or her wage below the required wage . . . but remain the responsibility of the employer.

65 Fed. Reg. at 80199 (2000).

Kutty contends that he should not be responsible for paying the fees associated with obtaining the H-1B visas because these were fees the doctors paid to attorneys, hired to serve their own interests, in helping them obtain the visas. Thus, the fees cannot be deemed Kutty's business expenses. In this regard, the comments to the INA's relevant implementing regulations state that "[t]he Department also recognizes that there may be situations where an H-1B worker receives legal advice that is personal to the worker" and "if an applicant for a job hired an attorney clearly to serve the employee's interest . . . to provide information necessary for the H-1B petition or review its terms on the worker's behalf, . . . the fees for such attorney services are not the employer's business expense." 65 Fed. Reg. at 80199-80200.

But, as the ALJ noted, the H-1B employer has the responsibility to submit the H-1B petition, and issue H-1B certifications and H-1B visa approvals. D. & O. at 71. *See also e.g.*, GX 23 at 33 (doctor's attorney has Kutty review, sign and date H-1B petition for Dr. Qadir); GX 17 at 31 (doctor's attorney requests that Kutty pay filing fee for H-1B petitions of Drs. Ionescu and Ilie); GX 11A at 3, 5; GX 27 at 33 (letters from Kutty and his representative requesting American Consul's approval of H-1B petitions for Drs. Ahmed and Venkatesh). Moreover, although attorneys undertook tasks that were clearly in the interest of the doctors, the ALJ found that the Administrator had not assessed fees charged for those tasks against Kutty. D. & O. at 72. Thus, because attorney fees and other costs connected to the preparation and filing of the H-1B petition are specifically considered to be a business expense of the employer, we reject Kutty's contention that he should not be responsible for paying such fees. *See* 20 C.F.R. § 655.731(c)(9)(ii) (2001), cited above. *See also* 20 C.F.R. § 655.731(c)(7) (1995).

Kutty argues that he should not be responsible for paying the J1 waiver fees and costs that the doctors paid because employers do not submit applications for J1 waivers and J1 waivers are the property of the applicant. The ALJ noted that neither the INA nor its implementing regulations and their accompanying comments address whether the costs associated with obtaining a J1 waiver should be considered an employer's business expense. Nevertheless, because a J1 waiver must be obtained before an H-1B visa can be issued, the ALJ found that the Administrator's determination that the J1 fees and costs are employer business expenses was a reasonable interpretation of the Act and the regulations and was within the Administrator's discretion. D. & O. at 72.

As we previously discussed, only upon receiving a J1 waiver is a nonimmigrant alien J1 visa holder eligible to obtain an H-1B visa. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 8 U.S.C.A. § 1184(i)(1), (1)(1)(B), (D)(ii). Moreover, if a State health agency makes a request for a J1 waiver on behalf of a J1 visa holder, as was done for the nonimmigrant doctors here, the application process requires a “letter from the facility that wishes to hire physicians” and a “signed contract” with “signatures of [the] physician and head of the facility.” See Frequently Asked Questions, U.S. State Dep’t, http://travel.state.gov/visa/temp/info/info_1294.html#types. The record shows that either Kutty or his representative referred the doctors to a business, HealthIMPACT America, which would assist them in applying for a J1 waiver. See GX 1 at 173; HT at 674, 722-723, 922-923, 990, 1104-1105, 1585-1586, 1971-1972, 2214, 2352. Dr. Manole referred to HealthIMPACT as Kutty’s “business partner.” See HT at 298. Kutty also filed letters and employment agreements with the Tennessee Department of Health in support of the doctors’ applications for J1 waivers. See GX 19 at 32; GX 49; GX 78 at 6. See also GX 11 at 29; HT at 720. Finally, Kutty noted on the H-1B petitions that the doctors had J1 waivers. See e.g., GX 11A at 10. Therefore, we find that Kutty participated in obtaining the necessary J1 waivers for the doctors he sought to hire.

Again, since the Administrator is vested with enforcement discretion in assessing appropriate remedies and may impose remedies she deems appropriate, we hold that the Administrator’s determination that the doctors were entitled to reimbursement of the J1 waiver costs was neither arbitrary nor an abuse of the Administrator’s discretion. See 20 C.F.R. § 655.810(e)(2).

3. Discrimination

The Administrator alleged that Kutty discriminated when he discharged seven of the doctors and, by withholding the pay of two others, constructively discharged them. The ALJ concluded that Kutty discriminated both by withholding the pay of eight doctors and by later terminating the employment of seven of them. GX 30; D. & O. at 83-88. Kutty contends that he stopped paying the doctors and then terminated their employment because they were working at a “sub-par level” and that the DOL had advised him to fire the doctors. Kutty Brief at 18-21.

H-1B employers may not discharge or discriminate against an employee because the employee has “disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation” of the INA or because the employee cooperates in an investigation concerning the employer’s compliance with the requirements of the INA. 8 U.S.C.A. § 1182(n)(2)(C)(iv); 20 C.F.R. § 655.801. This section “essentially codifies current [DOL] regulations concerning whistleblowers.” 65 Fed. Reg. 80178 (2000), quoting Senator Abraham, 144 Cong. Rec. S12752 (Oct. 21, 1998). The comments accompanying its implementing regulation state that the DOL, “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 the [DOL] (see 29 CFR part 24).” 65 Fed. Reg. at 80178. *See also* 29 C.F.R. Part 24 (2004).

For the Administrator to prevail on her charge that Kutty discriminated, she must prove by a preponderance of the evidence that the doctors engaged in protected activity, that Kutty knew about this activity, and that he took adverse action against them because of their protected activity. *See e.g., Hasan v. Enercon Servs., Inc.*, ARB No. 04-045, ALJ No. 03-ERA-31, slip op. at 3 (ARB May 18, 2005).

In January 2001, when the clinics were experiencing financial difficulties, Kutty began cutting some of the doctors’ salaries. GX 1 at 39-40. In his February 14, 2001 letter to Kutty on behalf of eight doctors, attorney Divine demanded that Kutty pay the salaries owed. GX 33; D. & O. at 84-86.⁹ If Kutty did not make such payments, Divine stated that he would pursue other remedies, including notifying the DOL of Kutty’s noncompliance with the terms of the doctors’ LCAs. *See* 20 C.F.R. § 655.731. Furthermore, Divine advised Kutty that he was prohibited from discriminating against the doctors for complaining about INA violations.

We find, like the ALJ, that, by this letter, the eight doctors disclosed information to Kutty that they reasonably believed constituted a violation of the Act, namely, failure to pay the required wages. Therefore, they engaged in protected conduct. 8 U.S.C.A. § 1182(n)(2)(C)(iv). Since Kutty received the letter, he knew about this protected activity. *See* HT at 2756.

After receiving Divine’s letter, Kutty stopped paying any salary to the eight doctors. Not paying the doctors their salaries constitutes adverse action. Kutty testified that he stopped paying the eight doctors because they were not working 40 hours per week in the clinics as their employment agreements required. HT at 2754-2756; D. & O. at 85-86.

The ALJ found that the record did not support Kutty’s reason for not paying the doctors. D. & O. at 72-74. She began by noting that the number of hours that an H-1B nonimmigrant employee works is irrelevant to the INA’s wage payment requirements. *See* 20 C.F.R. § 655.731(c)(4)-(5) (2001); 20 C.F.R. § 655.731(c)(3)-(4) (1995). *See also* 65 Fed. Reg. at 80195 (2000) (employer not required to keep hourly wage records for its full-time H-1B employees paid on a salary basis); D. & O. at 73. She rejected Kutty’s claim that only work in the clinics counted toward the 40-hour requirement and that any work at local emergency rooms constituted moonlighting and was not clinic work. She found “overwhelming evidence” that Kutty specifically directed the doctors to work in emergency rooms, hospitals, and nursing homes. Moreover, the doctors’ employment agreements stated that hospital rounds would count towards their 40 hour work week

⁹ Divine wrote his letter on behalf of Drs. Chicos, Ilie, Ionescu, Khan, Qadir, Venkatesh, Speil, and Naseem. GX 33.

requirement, and Kutty admitted as much. See GX 1 at 235. D. & O. at 73 n. 31. And, in fact, Kutty contracted for his doctors to work at hospitals. See GX 10A. Payments for those services were made to the clinics and not the doctors. See GX 13 at 50-58; GX 77; GX 1 at 235; RX 93. D. & O. at 16.

Mr. Hooli was the administrator of Kutty's Tennessee clinics. Kutty stated that he relied on Hooli's opinion that the eight doctors were not working the required 40 hours per week. GX 1 at 223-225. But Hooli testified that he could not say how much time the doctors worked at the clinics. HT at 2705-2707; D. & O. at 13, 73-74. Indeed, two of the affected doctors, Drs. Naseem and Venkatesh, testified that Hooli told them that if ever he was in court on this matter, he would "have to lie for my friend [Kutty]" about how long the doctors worked at the clinic. HT at 1210, 2273-2274; D. & O. at 41, 51, 74. A clinic secretary, Angela Hensley, similarly testified that after she was fired, Hooli offered her job back if she would write a letter stating that the doctors were not working the required hours in the office, which, she further testified, was not true. HT at 1290-1292; D. & O. at 44, 74.

Moreover, other evidence belies Kutty's reason for not paying the doctors. First, as the ALJ found, Kutty accused the doctors of not working the required 40 hours only after receiving Divine's letter. D. & O. at 74. Second, when Kutty ultimately fired the doctors, he retained Drs. Naseem and Venkatesh, whom he had characterized as the two worst offenders in not working the required hours. *Id.*; Compare GX 1 at 220-221 with HT 2760.

Therefore, we find that a preponderance of evidence demonstrates that Kutty's proffered reason for not paying the doctors, i.e. that they were not fulfilling the terms of their contract, was a pretext for not paying them.¹⁰ The real reason for not paying them was Divine's letter. See *Schlagel v. Dow Corning Corp.*, ARB No 02-092, ALJ No. 01-CER-1, slip op. at 14 (ARB April 30, 2004)(employee may establish discrimination by proving employer's proffered reasons for adverse action were not the true reasons but a pretext for discrimination). See also *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-508 (1993). Consequently, we find that the Administrator proved that Kutty violated the Act when he stopped paying eight doctors after receiving Divine's letter.

After Kutty stopped paying any salary to the eight doctors, Divine filed a complaint on their behalf with the DOL on February 28, 2001. GX 28. On March 14, 2001, the Administrator began an investigation and interviewed the doctors. GX 29A-29P; HT at 67-68. Both the complaint and the doctors' interviews constitute protected activity. See 8 U.S.C.A. § 1182(n)(2)(C)(iv); 20 C.F.R. § 655.801; 20 C.F.R. § 655.806. On March 19, 2001, the Administrator faxed a letter to Kutty notifying him that an on-

¹⁰ The ALJ reasonably construed a portion of Kutty's testimony to be an admission, thus direct evidence, that he stopped paying the doctors because of Divine's letter. See HT at 2754-2756; D. & O. at 85-86. We do not make this finding.

site investigation would commence at Kutty's Florida office on March 21, 2001. *See* GX 64, 82; 20 C.F.R. § 655.805. On March 21, 2001, an area representative for the Administrator began an on-site investigation of Kutty's records, and Divine also faxed a letter to Kutty demanding payment of salary amounts owed to two additional doctors. *See* GX 34. Later that same day, Kutty fired seven doctors.¹¹

In his pre-hearing brief, Kutty suggested that he had no knowledge that Divine had instigated the investigation on behalf of the doctors, and thus he was not aware of protected conduct. As the ALJ noted, however, a patient of one of the doctors, Annette Fonte, testified that Hooli told her that the doctors had "turned [Kutty] in to the labor board." HT at 2033-2035. Thus, the ALJ inferred that Kutty had knowledge of the doctors' protected activity. D. & O. at 86. We find that Kutty was aware that the doctors had filed a DOL complaint and DOL had begun an investigation. And the record leads us to reasonably infer that Kutty knew that the doctors had initiated the complaint and investigation.

Kutty proffered two reasons for terminating the doctors' employment. First, that the clinics were having financial problems and therefore he could not pay the doctors. And second, Kutty asserts that when the Administrator's investigator, Sandra Kibler, arrived at his Florida office on March 21 to inspect records, he explained to her that the clinics were in financial trouble and the doctors were not performing as promised. Kutty testified that Kibler then informed him that he was required to either pay the H-1B nonimmigrant doctors their required wage, or, in light of what he had said about the financial problems and the doctors not working, he could terminate their employment. HT at 2759-2760. But Kibler testified that she told Kutty that while he could have previously terminated his H-1B employees if he felt that they were underperforming, it was too late to do so once the Administrator began to investigate because it would "look like retaliation." HT at 2065-2067, 2087; D. & O. at 64-65, 87. The ALJ credited Kibler's testimony that she did not recommend that Kutty fire the doctors, and Kutty has not demonstrated that Kibler's testimony is false. Thus, we find that Kibler did not tell Kutty to fire the doctors.

The Administrator proved by a preponderance of the evidence that Kutty discharged the doctors, at least in part, because of the DOL complaint and the investigation. When Kutty fired the doctors three weeks after they filed the DOL complaint, one week after the investigation into the complaint began, and on the same day that DOL investigators arrived at his Florida office to examine records, his decision to discharge the doctors must be deemed, in the ALJ's words, "inextricably linked to their having complained to Kutty and the DOL about the failure to pay them the salary required by the INA." D. & O. at 88.¹²

¹¹ Kutty fired Drs. Chicos, Haque, Ilie, Ionescu, Khan, Qadir and Speil. GX 30.

¹² The ALJ concluded that Kutty could not prevail under a "dual motive" analysis. That is, Kutty did not show that, despite the DOL complaint and the subsequent investigation, he

4. Civil Money Penalties

The Act provides that the Administrator “may” assess civil money penalties up to \$1000 for non-willful violations such as failure to pay wages and up to \$5000 for willful violations or for discrimination. 8 U.S.C.A. § 1182(n)(2)(C)(i)-(ii); 20 C.F.R. § 655.810(b)(1)-(2)(i)-(iii). The Administrator assessed Kutty civil money penalties of \$4000 per violation for willfully failing to pay required wages, \$4000 per violation for discriminating against the doctors, and \$800 per violation for failing to make available LCAs and other necessary documentation. GX 30. No penalties were imposed for Kutty’s failure to maintain payroll records.

The ALJ found that Kutty admitted that he knew he was not going to pay the doctors the salaries listed on their LCAs. *See e.g.* GX 1 at 210-212 (regarding Dr. Khan’s salary). Thus, she concluded, like the Administrator, that Kutty’s failure to pay required wages was “willful,” which is defined as “a knowing failure or a reckless disregard with respect to whether the conduct was contrary to” the INA. 20 C.F.R. § 655.805(c); D. & O. at 90-91. We find that the Administrator and the ALJ correctly concluded that Kutty’s failure to pay wages was willful because the record supports such a conclusion.

The regulations specify seven factors that may be considered in determining the amount of the civil money penalties to be assessed: previous history of violations by the employer, the number of workers affected, the gravity of the violations, the employer’s good faith efforts to comply, the employer explanation, the employer’s commitment to future compliance, the employer’s financial gain due to the violations or potential financial loss, injury or adverse effect to others. 20 C.F.R. § 655.810(c).

would have fired the doctors because of the clinics’ financial woes. D. & O. at 88. We agree with this conclusion because the record supports it. We note, however, that the ALJ apparently applied the “clear and convincing” standard of proof in her dual motive analysis. D. & O. at 84. While we agree that even under the clear and convincing standard, Kutty could not prevail, we note that neither the Act nor the regulations specify the standard of proof to apply in gauging whether an INA employer may avoid liability under a dual motive analysis. The preponderance standard applies to the environmental whistleblower protection statutes listed at Part 24 of 29 C.F.R. *See Cox v. Lockheed Martin Energy Sys., Inc.*, ARB No. 99-040, ALJ No. 97-ERA-17, slip op. at 7 n. 7 (ARB Mar. 30, 2001). On the other hand, under the Energy Reorganization Act, also included in Part 24, the respondent employer’s dual motive burden is by clear and convincing evidence. 42 U.S.C.A § 5851(b)(2)(D) (West 2000). Therefore, in the absence of any clear indication in the Act or regulations as to which standard applies, we hold that, under the INA, an employer must demonstrate by a preponderance of evidence that it would have taken the same unfavorable personnel action in the absence of protected activity.

The ALJ considered these factors and concluded that the Administrator's assessment of civil money penalties was reasonable. Although Divine asserts that the Administrator's assessment of civil money penalties was conservative, the Administrator is vested with "enforcement discretion" "in fashioning remedies appropriate to the violation." 65 Fed. Reg. at 80180. *See also* 8 U.S.C.A. § 1182(n)(2)(C)(i)-(ii); 20 C.F.R. § 655.810(b)(1)-(2)(i)-(iii), (e)(2), (f). Consequently, as the Administrator is vested with discretion in calculating the amount of civil money penalties, and the record demonstrates that she did not abuse that discretion, we will not modify the Administrator's assessment or the ALJ's determination.

5. Personal Liability for Back Wages and Civil Money Penalties

The Administrator charged Kutty and the various corporate entities listed on the LCAs as employers.¹³ Under the Act, the entity named as the employer on the LCA is liable. *See Administrator v. Native Techs., Inc.*, ARB No. 98-034, ALJ No. 96-LCA-2, slip op. at 7-8 (ARB May 28, 1999). But because all of Kutty's Tennessee clinics had closed, the Administrator "pierced the corporate veil" and held Kutty personally liable for the back wages and the civil money penalties. Kutty contends that he acted in good faith and, therefore, should not be personally liable.

The ALJ applied Tennessee common law in piercing the corporate veil and holding Kutty personally liable.¹⁴ She discussed the factors that Tennessee courts consider relevant in determining whether to pierce the corporate veil. D. & O. at 99-101.¹⁵ Then she found that "[m]ost of those factors are present in the case at hand."

¹³ The named corporate entities are: Sumeru Health Care Group; Sumeru Health Care Group, Inc. (incorporated in Florida, GX 5); Sumeru Health Care Group, Inc. (incorporated in Tennessee, GX 2); Sumeru Health Care Group, Inc. (TN); Sumeru Health Care Group, L.C. (of Florida, GX 6) d/b/a Center for Internal Medicine and Pediatrics, Inc.; Sumeru Health Care Group, L.C. d/b/a Center for Internal Medicine and Pediatrics, P.C.; Center for Internal Medicine and Pediatrics, Inc. (incorporated in Tennessee, GX 3); Center for Internal Medicine and Pediatrics, P.C.; Maya Health Care, L.C., or other similar variations. *See* D. & O. at 94-99.

¹⁴ *Carter-Jones Lumber Co. v. LTV Steel Co.*, 237 F.3d 745, 746 n.1, 750 (6th Cir. 2001) (applied state common law to pierce corporate veil in claim arising under the liability provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C.A. § 9601 *et seq.* (West 1995)). *See also United States v. Bestfoods*, 524 U.S. 51, 55, 63 n.9, 64 (1998) (leaving open the question whether state or federal common law applies to pierce corporate veil in case involving federal statute).

¹⁵ The ALJ cited *Muroll Gesellschaft M.B.H. v. Tennessee Tape, Inc.*, 908 S.W.2d 211 (Tenn. Ct. App. 1995) and *VP Bldgs., Inc. v. Polygon Group, Inc.*, No. M2001-00613-COA-R3-CV, 2002 WL 1564 (Tenn. Ct. App. 2002). *See also Boles v. Nat'l Dev. Co., Inc.*, No.

First, the Tennessee corporations were “undercapitalized” and Kutty supported them with funds from his Florida businesses and his own personal funds. Second, the record contained no evidence that Kutty issued stock certificates for the corporations. Kutty was the sole owner and had sole control over the corporate entities that submitted LCAs. Third, Kutty made all decisions regarding the corporations, and the administration of the corporate entities was shared in the same, centralized office. Fourth, she found that the assets of the corporations were interchangeable and their dealings were not at arm’s length. D. & O. at 101.

Kutty contends that he should not be personally liable because he did not transfer assets from any of the corporate entities to avoid debts or pay himself any salary or commingle corporate funds with his personal funds, but actually transferred personal funds into the corporations to keep them viable. And the mere fact that a corporation has gone out of business is not sufficient grounds, Kutty argues, to pierce the corporate veil. Kutty Brief at 22-23.

Furthermore, Kutty argues that no authority exists under the INA’s H-1B provisions or its implementing regulations for imposing personal liability.¹⁶ Kutty also argues that imposing personal liability under the INA’s H-1B provisions would frustrate the Act’s purpose, which is to facilitate American global economic competitiveness while protecting American workers, and, in effect, would constitute rule-making without providing for notice and comment. Nor, Kutty notes, did he consent to be held personally liable as a consequence of being a voluntary and good faith participant in the H-1B program.

But under the circumstances herein, we reject Kutty’s arguments. In light of the fact that the employing corporations are out of business and likely have no assets, a decision not to hold Kutty liable would be grossly unfair to the doctors because Kutty

M2003-00971-COA-R3-CV, ___S.W. 3d___, 2005 WL 975358, *14-16 (Tenn. Ct. App. Apr. 26, 2005) citing *VP Bldgs.*

¹⁶ In his response to the Board’s Order granting Kutty’s Motion for Reconsideration, Kutty references a February 3, 2004 ALJ D. & O., *Administrator, Wage & Hour Div., United States Dep’t of Labor v. Abcom Consulting and Training, LLC*, 2004-LCA-0011 (ALJ Feb. 3, 2004), where the ALJ cites a letter from Abcom’s attorney to her in which he states that the Office of the Solicitor, U. S. Department of Labor, representing the Administrator, interprets the INA as not allowing for personal liability. The ALJ further noted that the Administrator did not respond though she had the opportunity to do so. From this, Kutty argues that the Administrator acknowledges that the DOL interprets the INA as not allowing personal liability for violations of the INA. However, the Administrator notes in her response to the Board’s Order Granting Reconsideration that her decision to not pierce the corporate veil in *Abcom* was one of “prosecutorial discretion” and that it does not reflect any change in her position that Kutty should be held personally liable.

willfully violated the requirements of the Act. Furthermore, as the ALJ found, when Kutty terminated the doctors' employment because they engaged in protected activity, the clinics could not have continued to operate, thus any possibility that the Tennessee corporations might pay the back wages and the civil money penalties was foreclosed. Consequently, because Kutty's corporations had, in the ALJ's words, "no mind, will, or existence of their own" and his "domination" was used to perpetuate violations of the Act, we conclude that, in addition to the corporate respondents, Kutty is personally liable for the back wages and the civil money penalties. D. & O. at 101.

6. Debarment

The Act compels the Secretary to notify the Attorney General in the event she finds that an "employer" has willfully violated the Act or discriminated. The Attorney General then must debar the employer from employing H-1B nonimmigrants for two years. 8 U.S.C.A. § 1182(n)(2)(C)(ii).¹⁷ The Act does not define "employer." But the implementing regulations define an "employer" as a "person, firm, corporation, contractor, or other association or organization in the United States which has an employment relationship with H-1B nonimmigrants and/or U.S. workers." 20 C.F.R. § 655.715.¹⁸

Kutty argued to the ALJ that though he signed the LCAs, he did so only as President and Medical Director of the corporation and not in an individual capacity. The ALJ agreed with the Administrator, however, that Kutty was an employer because he met the definition of "employer."

In our environmental whistleblower jurisprudence, which, as we noted, applies to discrimination claims under the INA, we held that the crucial factor in determining whether an employment relationship exists is whether the respondent acted in the capacity of an employer, that is, exercised control over, or interfered with, the terms,

¹⁷ The Administrator provided notification of the relevant INA violations to the DOL's ETA and the Attorney General in accordance with 8 U.S.C.A. § 1182(N)(2)(C)(ii)(II) and 20 C.F.R. §§ 655.810(d)(2); 655.855(a). GX 30.

¹⁸ Under the previous implementing regulation, to be considered an "employer," the "person" or "corporation" had to have an Internal Revenue Service tax identification number. *See* 20 C.F.R. § 655.715 (1995). The current amended version of the regulation, which became effective on December 20, 2000, does not contain this requirement. *See* 65 Fed. Reg. 80211 (2000). Nevertheless, in his response to the Board's Order granting Dr. Kutty's Motion for Reconsideration, Kutty contends that the IRS tax number requirement was still in effect until November, 23, 2004, and therefore, since no proof was adduced that he had a tax number, he cannot be an "employer." Contrary to Kutty's contention, although Section 655.715 was again amended in part, effective November, 23, 2004, the IRS Service tax identification number requirement had already been removed. *See* 69 Fed. Reg. 68228 (2004).

conditions, or privileges of the complainant's employment. The ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant, is evidence of the requisite degree of control. *Seetharam v. General Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-21, slip op. at 5 (ARB May 28, 2004); *Lewis v. Synagro Techs., Inc.*, ARB No. 02-072, ALJ Nos. 02-CAA-12, 14, slip op. at 8 n. 14, 9-10 (ARB Feb. 27, 2004).

The record demonstrates that Kutty hired, reprimanded, and discharged the doctors. Thus, he exercised control over and interfered with the doctors' employment. Therefore, we conclude that an "employment relationship" existed between Kutty and the doctors and that he was their employer. Consequently, the Attorney General should debar Kutty for two years.

CONCLUSION

The Administrator proved that Kutty and the corporations violated the Act when they did not pay the 17 doctors the required wages. She also properly concluded that Kutty and the corporations must reimburse those doctors who paid J1 waiver and H-1B visa costs and expenses. Furthermore, the Administrator met her burden of proof that Kutty and the corporations violated the Act when they discriminated against nine doctors. Moreover, the Administrator's assessment of civil money penalties is reasonable. Therefore, we **AFFIRM** the ALJ's Order dated October 9, 2002. Additionally, the circumstances herein compel us to conclude that Kutty is personally liable for the back wages, the reimbursements, and the civil money penalties. Finally, we conclude that the Attorney General should debar Kutty for two years.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge