ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

IN THE MATTER OF:	)	
	)	
MOHAN KUTTY, M.D. d/b/a CENTER FOR INTERNAL MEDICINE AND PEDIATRICS, INC., ET AL.,	)	ARB Case No. 03-022
	)	ALJ Case No. 01-LCA-10 through 01-LCA-025
Petitioner,	)	
v.	)	
ADMINISTRATOR, WAGE & HOUR DIVISION, EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEPARTMENT OF LABOR,	)	
Respondent.	)	

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IN THE MATTER OF: MOHAN KUTTY, M.D. d/b/a CENTER FOR INTERNAL MEDICINE AND PEDIATRICS, INC., ET AL., Petitioner, v. ADMINISTRATOR, WAGE & HOUR DIVISION, EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEPARTMENT OF LABOR, Respondent.	ARB Case No. 03-022 ALJ Case No. 01-LCA-10 through 01-LCA-025

ADMINISTRATOR'S RESPONSE BRIEF

Pursuant to the Administrative Review Board's Orders dated February 13 and 25, 2003, the Administrator of the Wage and Hour Division ("Administrator") submits her brief seeking affirmance of the Decision and Order of Administrative Law Judge Alice M. Craft ("ALJ"), dated October 9, 2002, in this matter arising under the Immigration and Nationality Act ("INA" or "the Act" or "Immigration Act") H-1B visa program, 8 U.S.C. 1101(a)(15)(H)(i)(b) and 1182(n), and the implementing

regulations at 20 C.F.R. 655, Subparts H and I.[1]

ISSUES PRESENTED

(1) Whether the approval by the Department of Labor ("DOL") and the Immigration and Naturalization Service ("INS") of allegedly "defective" LCAs and H-1B petitions relieved Dr. Mohan Kutty and the corporate entities[2] of their responsibilities under the Immigration Act, including that of paying the required wage rate.

(2) Whether the ALJ properly awarded business expenses incurred by the doctors in order for Dr. Kutty to obtain H-1B visas and the doctors to obtain J-1 waivers.

(3) Whether Dr. Kutty and the corporate entities retaliated against the H-1B doctors in violation of the INA.

(4) Whether the corporate veil was properly pierced, and consequently Dr. Kutty is personally liable for the violations

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[1]The implementing regulations were amended on December 20, 2000. See DOL Interim Final Rule, 65 Fed. Reg. 80110 (December 20, 2000). The events in this case occurred both before and after the effective amendment date. Unless otherwise noted, the cite to the amended regulations is provided, since the amendments did not substantively change the requirements with respect to the events that occurred before the amendments.

[2]We discuss infra (issue 4) why the ALJ was correct to hold Dr. Kutty individually liable by means of piercing the corporate veil. The violations we discuss first are relevant, in part, to this issue.

of the Immigration Act.

STATEMENT OF THE CASE

A. Course of Proceedings

The Wage and Hour Division conducted an investigation regarding the employment of 17 H-1B doctors by Dr. Mohan Kutty and various corporate entities controlled by Dr. Kutty.[3] Following the investigation, the Administrator issued determination letters on April 13, 2001, finding that Dr. Kutty and the corporate entities had violated the provisions of the INA by willfully failing to pay required wage rates, failing to make available for public examination the applications and necessary documents, and failing to maintain payroll records. The Administrator also found that Dr. Kutty and the corporate entities had discriminated against nine of the H-1B doctors for engaging in protected activity. The Administrator assessed back wages and civil money penalties. Dr. Kutty and the corporate entities requested an administrative hearing on these determinations pursuant to 20 C.F.R. 655.820(a). After holding a hearing, the ALJ issued a Decision and Order ("D & O") on

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[3]The subject doctors are: Nazeen Ahmed, Ferdinand Casis, Alexandru Chicos, Srinivasa Chintalapudi, Ahsanul Haque, Ionut Ilie, Madalina Ionescu, Sivalingam Kanagasegar, Rafay Khan, Victor Manole, Dragos Munteanu, Shoaib Naseem, Maqbool Qadir, Vlad Radulescu, Rajesh Rohatgi, Christian Speil, and Vivek Venkatesh.

October 9, 2002, finding that Dr. Kutty and the corporate entities had committed the violations charged in the determination letters. She ordered Dr. Kutty and the corporate entities to pay the 17 doctors back wages totaling $1,044,294.04, and civil money penalties in the amount of $108,800.00. Dr. Kutty and the corporate entities have appealed the Decision and Order.

B. Statement of Facts

Between 1998 and 2000, Dr. Mohan Kutty opened five clinics in Tennessee and hired the 17 H-1B doctors who are the subjects of this case (D & O 10; Hearing Transcript ("Tr.") 2743). Dr. Kutty signed the Labor Condition Applications ("LCAs") for all 17 doctors as the medical director of the employing corporations and checked the box "to indicate that the employer will comply with" the following statement:

> H-1B nonimmigrants will be paid at least the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question <u>or</u> the prevailing wage level for the occupation in the area of employment, <u>whichever is higher</u>."

(Government Exhibit ("GX") 1 at 171; GX 11-27[4], ETA Form 9035,

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[4]GX 11 at 5; GX 11-A at 2; GX 12 at 5; GX 13 at 8-9; GX 14 at 5; GX 15 at 11; GX 16 at 9; GX 17 at 11; GX 18 at 5; GX 19 at 11; GX 20 at 5; GX 21 at 5; GX 22 at 14; GX 23 at 10-11; GX 24 at 5-6; GX 25 at 10-11; GX 26 at 10-11; GX 27 at 16.

Box 8a) (emphases in original). Dr. Kutty also signed the following attestation on the LCAs:

> 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 of the Immigration and Nationality Act.

(GX 1 at 171; GX 11-27, ETA Form 9035, Box 9) (emphasis added).

Additionally, Dr. Kutty signed the H-1B petitions (filed with the INS) for all 17 doctors. He attested to the following:

> 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 1 at 171; GX 11-27[5], Supplement to Form I-129, Section 1).[6]

The applicable prevailing wage rates ranged from $52,291 to $115,357, but the doctors generally received far less than this

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[5]GX 11 at 12; GX 12 at 11; GX 13 at 17; GX 14 at 9; GX 15 at 18; GX 16 at 14; GX 17 at 16; GX 18 at 8; GX 19 at 18; GX 20 at 8; GX 21 at 10; GX 22 at 16-17; GX 23 at 15; GX 24 at 12; GX 25 at 17; GX 26 at 16; GX 27 at 21.

[6]In most cases, the doctors used the services of Dr. Kutty's in-house counsel, Ms. Sarmov, to assist them in obtaining the necessary approvals from INS and DOL (D & O 13). Dr. Kutty told some of the doctors to use Ms. Sarmov because of problems he was having with other lawyers. (D & O 13; GX 1 at 170).

(D & O 77-83; GX 16 at 9 and 35; GX 20 at 5).[7] Despite signing the LCAs and H-1B petitions and attesting that he would pay the prevailing wage rates, Dr. Kutty did not intend to pay the prevailing wage rates (D & O 91; GX 1 at 65-67, 158-161, 210-212; Tr. 127-129, 1791, 1873-1874). Instead, Dr. Kutty expected that the clinics would lose money for three to five years and accordingly planned to underpay the doctors (D & O 10; GX 1 at 17; Tr. 128-129, 1735-1737, 2179, 2231-2232, 2371-2373). He had even entered into employment contracts with the H-1B doctors providing for a salary lower than many of the prevailing wage rates, and did not even intend to pay these rates (D & O 10; GX 11-27; Tr. 303-304, 744-745, 929-930, 1455-1456, 1735-1740, 2230-2231, 2375-2376, 2751; GX 1 at 65-67, 210). Specifically, the contracts provided an annual salary of $80,000, and an incentive bonus of 25% of revenues billed exceeding $250,000 (D & O 10; GX 11-27). In most cases the doctors were not paid the $80,000 salary, and no bonuses were ever paid (D & O 75-83; GX 1 at 207).[8] Although the doctors moved to Tennessee to start work, jobs were not always available when they arrived. (See,

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[7]The fact that the doctors generally received less than the LCA amounts is not disputed.

[8]The agreements were contingent on the doctors obtaining licenses to practice in Tennessee, local hospital privileges, and HMO and Medicare approvals (D & O 10; GX 11-27).

e.g., Tr. 680-686, 739-745, 2224-2232).

The 17 doctors had 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 (D & O 11). See 8 U.S.C. 1182(e) and (j)(1). They could obtain a waiver of the requirement to return home if they could show that they would be working for three years in an "underserved area" -- a geographic area with a shortage of health care professionals -- as designated by the Secretary of Health and Human Services (D & O 11). See 8 U.S.C. 1184(l)(1)(D). Under the "State 20" program, each state may be allocated 20 waivers in any fiscal year (D & O 11-12).[9] The application for a J1 waiver and H-1B visa require separate applications to INS, and obtaining the waiver is a prerequisite to securing the visa (D & O 12, 72).[10] The doctors used the services of a company called HealthIMPACT to complete the application for the J-1 waiver, often at the suggestion of Dr. Kutty, or his in-house counsel, Kalina Sarmov (D & O 17-18; Tr. 298, 804-805, 923, 1585-1586, 2214, 2350-2352).

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[9]The maximum number is now 30. See 8 U.S.C. 1184(l)(1)(B).

[10]The initial application for a J-1 waiver is made to the State Department, U.S. Information Agency, which makes a recommendation to INS. See, e.g., GX 15 at 14.

Dr. Kutty practices medicine in Florida under the corporate identity Center for Internal Medicine, Inc., a Florida corporation (D & O 11; GX 1 at 139). Dr. Kutty and his wife, Sheela Kutty, jointly own the Florida corporation as tenants in the entirety, and are the only officers and directors (D & O 11; GX 1 at 140, GX 4).

The Florida corporate office handled the administration for all of Dr. Kutty's Florida and Tennessee operations (D & O 11; GX 1 at 73; Tr. 1354-1355, 1406). However, 13 other corporate entity names were used with respect to employing the H-1B doctors (D & O 94-97). These names were often used interchangeably with respect to employment of the same doctor. Id. For example, Dr. Chicos's LCA lists "Sumeru Health Care Group" as the employer, his paychecks were issued by "Sumeru Health Care Group, Inc." and by "Center for Internal Medicine and Pediatrics, Inc.," and his W-2 was issued by "Center for Internal Medicine and Pediatrics, P.C." Dr. Chicos was terminated by "Maya Health Care." (GX 13 at 8, 30, 41, 48).

Dr. Kutty made all major decisions about the clinics, including how many staff would be hired. He hired the doctors and decided how much they would receive for each paycheck (D & O 11; GX 1 at 42-43, 46-48, 62). The Tennessee employees would

call Doctor or Mrs. Kutty with questions, and Mrs. Kutty had to go to her husband before any decisions were made. Doctor or Mrs. Kutty signed all checks. Id. If there was a problem with billing, patients had to call Florida (Tr. 2318-2319).

The doctors worked diligently to establish the Tennessee clinics and build up patient caseloads (D & O 18, 20-21, 27-33, 37-38, 41, 43-46, 48-52, 58-61, 63, 73-74, 87). However, there were many problems with Florida's handling of billing for the Tennessee clinics (D & O 14, 17; Tr. 2319, 2327-2328, 2333-2338, Tr. 136-138; GX 1 at 82). The clinics were operating at a deficit (D & O 14; Tr. 2408). Dr. Kutty and his administrator, Mr. Basavaraj Hooli, blamed the doctors for the clinics' financial problems (D & O 14, 16, 73-74, 87; Tr. 1556-1558, 2709-2727, 2752-2757, 2763-2766, 2778-2779; GX 1 at 23, 31-38). Dr. Kutty therefore decided to withhold the doctors' salaries and then release the salaries when the doctors started seeing more patients (D & O 14; Tr. 2718, 2755-2756; GX 1 at 37-38).

Eight of the doctors[11] hired attorney Robert Divine, who, on February 14, 2001, wrote a letter on their behalf demanding payment of amounts due them, stating in part:

[T]hey hereby demand immediate payment of all amounts

[11]Doctors Chicos, Venkatesh, Speil, Khan, Ilie, Ionescu, Qadir, and Naseem.

> 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 and 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.

(GX 33)(footnote omitted). Mr. Divine also cited the statute's anti-discrimination and "no benching" provisions (see infra). Id. None of the doctors represented by Mr. Divine was paid thereafter except for one partial payment (D & O 15, 19; Tr. 128, 132, 142-143, 148-149, 832-833, 864, 1216-1217, 1513-1514; 1673-1675, 1695-1696, 1767-1768, 1916-1917, 2267-2268, 2290; GX 23E; GX 19A; GX 41; GX 44 at 3 and 9; GX 71 at 4). By contrast, the doctors who did not complain received paychecks (Tr. 1001, 2196; GX 12 at 29 and 36; GX 18F; GX 81). Additionally, Dr. Kutty sent letters to five of the doctors named in the letter, accusing them of falling short of their duties. The letters indicated that they were not to be construed as a discharge notice (GX 16 at 34; GX 17 at 34; GX 75; GX 32; GX 39).

On February 28, 2001, Mr. Divine filed a complaint with DOL

on behalf of the same eight doctors (D & O 86; GX 28). On March 19, 2001, DOL sent Dr. Kutty a letter by facsimile stating that it would be conducting an investigation on March 21, 2001 (D & O 86; GX 64; GX 82). As promised, Wage-Hour conducted an on-site record inspection at Sumeru Health Care Group on March 21st (Tr. 2044, 2047). On that same day, Mr. Divine faxed a letter to Dr. Kutty demanding that two additional doctors -- Doctors Rohatgi and Haque -- receive back wages owed them (D & O 63; GX 34).[12] Later that day, Dr. Kutty fired seven of the ten doctors represented by Attorney Divine (D & O 86; GX 13 at 30; GX 15 at 28; GX 16 at 33; GX 17 at 33; GX 19 at 37; GX 23-F; GX 26 at 27).[13] He retained the other three complainants (Doctors Naseem, Rohatgi, and Venkatesh) to keep the organization "viable," as well as the three doctors who were not represented by Mr. Divine (D & O 86; Tr. 2760). Ultimately, Doctors Naseem, Rohatgi, and Venkatesh notified Dr. Kutty that they considered their employment contracts to be in breach because of Dr. Kutty's failure to pay wages (D & O 41, 51, 62; Tr. 205, 257; GX 27 at 8-10; GX 40).

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[12]Mr. Divine also amended the DOL complaint to add Doctors Rohatgi and Haque (GX 15 at 8; GX 25 at 7).

[13]Doctors Chicos, Haque, Ilie, Ionescu, Khan, Qadir, and Speil.

C. The ALJ's Decision

ALJ Alice M. Craft found no factual support for the allegations by Dr. Kutty and the corporate entities that DOL conducted a biased and unfair investigation (D & O 66). She also rejected their contention that INS erred in approving the H-1B visas and should therefore bear the consequences of Dr. Kutty's failing to pay the required wage rates (D & O 74). Specifically, according to the ALJ, it was permissible for INS to issue the H-1B visas before the doctors obtained Tennessee medical licenses, because the INA contains a "no benching" requirement.[14] All of the doctors did eventually obtain their Tennessee medical licenses and other required credentials (D & O 74-75). The ALJ concluded that even if the H-1B visas should never have been granted, this does not relieve Dr. Kutty from paying back wages, because that would penalize the H-1B doctors

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[14]The employer must pay the required wage rate (in 8 U.S.C. 1182(n)(1)(A)) to an H-1B worker who has not yet entered into employment with the employer, within 30 days after the date the worker is first admitted to the United States. In the case of a worker who is already present in the United States when the petition is approved, the required wage rate must be paid within 60 days after the worker becomes eligible to work for the employer. See 8 U.S.C. 1182(n)(2)(C)(vii)(III). Additionally, the employer is required to pay the required wage rate to an H-1B worker who has entered into employment, even if the employer places the worker in nonproductive status due to the worker's "lack of a permit or license." 8 U.S.C. 1182(n)(2)(C)(vii)(I) and (II).

for Dr. Kutty's misrepresentations (D & O 75).

The ALJ also rejected the argument that the petitions should have been denied because of inconsistencies between the wages stated on the LCAs and on the employment agreements (D & O 74-75). There was no evidence that employment agreements were submitted to DOL along with the LCAs. Additionally, the regulations require only submission of the LCA form promulgated by DOL. Dr. Kutty signed the LCA form for each doctor, thereby obligating himself to observe its terms. The ALJ also found that Dr. Kutty never intended to pay the wage rates set forth in the LCAs. Finally, the ALJ stated that the statute governs, not the employment agreements (D & O 75).

With respect to reimbursement for business expenses, the ALJ held that since the doctors were paid less than the required wage rates, they must be reimbursed for business expenses. The amended regulations explicitly provide that preparation and filing of the LCA and H-1B petition are the employer's business expenses. Obtaining a J1 waiver is a prerequisite to obtaining the H-1B visa, so it was "a reasonable interpretation of the law and the regulations, and within the Secretary's discretion," to assess these costs. (D & O 70-72).

With respect to the retaliation claims, the ALJ held that

based on her credibility determinations and the weight of the evidence, Dr. Kutty and the corporate entities committed two discrete acts of discrimination against the doctors: (1) 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 the eight; and (2) when they complained to DOL, Dr. Kutty fired seven of the ten doctors then represented by Mr. Divine (D & O 72-74, 84-88). The ALJ found that Dr. Kutty's testimony provided direct evidence of the first act of discrimination. She also concluded that "retaliatory motive was at least a contributing cause to the terminations," and that the decision to terminate the doctors was "inextricably linked to their having complained to Dr. Kutty and DOL about the failure to pay them the salary required by the INA." (D & O 88). "Putting Dr. Kutty's testimony in the best light," the ALJ applied a mixed motive analysis, and concluded that Dr. Kutty failed to prove that he would have fired the doctors even had they not complained to him and DOL (D & O 84, 88).

Finally, the ALJ held that piercing the corporate veil is appropriate in this case (D & O 101). She found that the corporations were undercapitalized and a sham, and "had no mind, will, or existence of their own." Id. Dr. Kutty's

"domination" of the corporate entities was used to "perpetrate violations of statutory duties." Id. That domination was "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." Id. The ALJ further noted that the corporate entities have no assets to pay the back wages or civil money penalties, and that any possibility of the clinics remaining in business and generating income to pay the doctors was foreclosed by Dr. Kutty's termination of the employees in retaliation for engaging in protected conduct. Therefore, piercing the veil "is necessary to do justice for the H-1B employees." Id.

ARGUMENT

A. Standard of Review

The Board reviews the ALJ's findings of fact and legal conclusions de novo. See U.S. Dept. of Labor v. Alden Management Services, Inc., ARB Case Nos. 00-020; 00-021 (Aug. 30, 2002); U.S. Dept. of Labor v. Beverly Enterprises, Inc., ARB Case No. 99-050 (July 31, 2002). See also 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except it may limit the issues on notice or by rule.").

B. Statutory and Regulatory Framework

The H-1B visa program is a voluntary program that permits employers to temporarily secure and employ nonimmigrants to fill specialized jobs in the United States. See INA, 8 U.S.C. 1101(a)(15)(H)(i)(b). The INA requires that an employer pay an H-1B worker the higher of its actual wage or the locally prevailing wage. See 8 U.S.C. 1182(n)(1)(A). The prevailing wage provisions safeguard against the erosion of U.S. workers' wages and moderate any economic incentive or advantage in hiring temporary foreign workers. See, e.g., H.R. Rep. No. 106-692, at *12 (2000) (discussion of DOL's 1996 Office of Inspector General report). Under the INA, as amended by the Immigration Act of 1990 ("IMMACT"), Pub. L. No. 101-649, 104 Stat. 4978, and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 ("MTINA"), Pub. L. No. 102-232, 105. Stat. 1733, an employer seeking to hire an alien in a specialty occupation,[15] or as a fashion model of distinguished merit and ability, must seek and get permission from the DOL before the

[15]The INA defines a "specialty occupation" as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher. 8 U.S.C. 1184(i)(1).

alien may obtain an H-1B visa from the State Department.[16] Specifically, the statute requires an employer seeking to employ an H-1B worker to submit a Labor Condition Application ("LCA") to the DOL. See 8 U.S.C. 1182(n)(1).

In filing the LCA with the Department, the employer attests that:

> (A) The employer -
>
> (I) is offering and will offer [the H-1B worker] during the period of authorized employment. . . 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
>
> (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.

8 U.S.C. 1182(n)(1)(A) (emphases added). The statute requires DOL to certify the application within seven days unless it is incomplete or contains "obvious inaccuracies." 8 U.S.C. 1182(n)(1), unmarked paragraph preceding 8 U.S.C. 1182(n)(2). Only after the employer receives the Department's certification

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[16] Section 212(n) of the INA, 8 U.S.C. 1182(n), was again amended by the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"), Title IV of Pub. L. No. 105-277, 112 Stat. 2681 (Oct. 21, 1998).

of its LCA, may the INS approve an H-1B petition seeking authorization to employ a specific nonimmigrant worker. See 8 U.S.C. 1101(a)(15)(H)(i)(b); 20 C.F.R. 655.700(a)(3).[17]

The statute also prescribes a framework for enforcement proceedings and sanctions, directing 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.

8 U.S.C. 1182(n)(2)(A). The Department has promulgated regulations which provide detailed guidance regarding the determination, payment, and documentation of the required wages. See 20 C.F.R. 655.700 et seq. The remedies for violations of the statute or regulations include payment of back wages to H-1B workers who were underpaid, notification to the Attorney General for debarment of the employer from future employment of aliens, civil money penalties, and other administrative relief that the

[17]After INS notifies the employer of its approval of the H-1B petition, the employee leaves the United States to obtain the H-1B visa stamp in his or her passport upon return to the United States (D & O 12-13).

Administrator deems appropriate. See 20 C.F.R. 655.810, 655.855.

C. The approval by the Department of Labor and the Immigration and Naturalization Service of allegedly "defective" LCAs and H-1B petitions did not relieve Dr. Kutty and the corporate entities of their responsibilities under the Immigration Act, including that of paying the required wage rate.

Dr. Kutty and the corporate entities contend that their rights were "impermissibly violated." (Petitioners' Brief ("Pet. Br."), p. 4). Specifically, they argue that the LCAs and H-1B petitions were defective, and that they should never have been approved by DOL and INS, respectively; since they were approved, DOL and INS must share some of the responsibility for the violations committed by Dr. Kutty and the corporate entities, and the ALJ violated their rights by not holding the government responsible (Pet. Br., pp. 4-14).

Dr. Kutty and the corporate entities are estopped from arguing that they are not liable because the LCAs and petitions should not have been approved in the first place. In Alden, supra, the Board reviewed an analogous claim under the Immigration Nursing Relief Act of 1989, 8 U.S.C. 1182(m) et seq. ("INRA"), in which the employer was given permission to hire nonimmigrant nurses after filing required attestations with the Department of Labor and petitions with INS. The employer failed

to pay the nurses the prevailing wage as required by INRA. The employer claimed that it did not meet the definitional requirement necessary to be covered by INRA (i.e., that it was a "facility"), so that DOL had no authority to enforce back wages under the statute. In rejecting this argument, the Board noted that since the employer secured the benefits of the Act -- the permission for alien registered nurses to provide services as its employees -- it was estopped from denying that it was a facility (Alden at page 8). See also Johnson v. Georgia Dept. of Human Resources, 983 F. Supp. 1464, 1470 (N.D. Ga. 1966) (a party advocating two sharply contradictory positions "will not be permitted to 'speak out of both sides of his mouth with equal vigor and credibility before this court'") (quoting Reigel v. Kaiser Foundation Health Plan of Carolina, 859 F. Supp. 963, 970 (E.D.N.C. 1994)); Technicon Med. Info. Sys. Corp. v. Green Bay Packaging, Inc., 687 F.2d 1032, 1034 (7th Cir. 1982), cert. denied, 459 U.S. 1106 (1983).

Similarly, in this case, the employer obtained the benefits of the H-1B program by filing the LCAs and H-1B petitions and certifying under penalty of perjury that he was providing correct information. He is now seeking to absolve himself of responsibility because he claims, after the fact, that he did

not meet the necessary threshold requirements to be covered by the law.[18] This is a truly perverse argument that should be rejected.

Moreover, the INA does not allow DOL to reject an application unless "the application is incomplete or obviously inaccurate." 8 U.S.C. 1182(n)(1), unmarked paragraph preceding 8 U.S.C. 1182(n)(2). The regulations further provide that "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 C.F.R. 655.740(c). In this case, the LCAs were neither incomplete nor obviously inaccurate -- the employer attested that he will pay the higher of the actual wage or the prevailing wage for the occupation in the area of employment. In all cases he listed a prevailing wage, a prevailing wage source, and a rate of pay equal to at least 95% of what he listed as the prevailing wage, which is permitted under the regulations. See 20 C.F.R. 655.731(a)(2)(iii) and (d)(4). As noted by Congress,

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[18]The employer's contention that "no clear indication of the employer's intent to pay either the prevailing or actual wage existed within the petitions" is contradicted by the signed declarations in both the LCAs and petitions (Pet. Br., pp. 13-14).

DOL is authorized to investigate non-obvious errors on LCAs only in enforcement actions such as this, not upon initial review:

> Because of the need of employers to bring H-1B aliens on board in the shortest possible time, the H-1B program's mechanism for protecting American workers is not a lengthy pre-arrival review of the availability of suitable American workers (such as the labor certification process necessary to obtain most employer-sponsored immigrant visas). Instead, an employer files a "labor condition application" with the Department of Labor making certain basic attestations (promises) and the Department then investigates complaints alleging noncompliance.

H.R. Rep. No. 106-1048, *171, 106th Cong., 2d Sess. (2001), 2001 WL 67919, p. 464 of 617.[19]

The employer contends that "[i]n many cases the H-1B petitions of the alien doctors did not even contain evidence of their ability to practice medicine in the State of Tennessee" and that the INA "innately presuppose[s]" that the "H-1B recipient will possess all the necessary skills and qualifications of a position upon commencement of work, if not sooner." (Pet. Br., pp. 9-10). To the contrary, the INA recognizes that the H-1B worker may be employed without a license -- it explicitly prohibits an employer from placing a worker in nonproductive status because of the worker's "lack of a permit or license." 8 U.S.C. 1182(n)(2)(C)(vii)(I). <u>Cf</u>. 20

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[19]The investigatory provisions are set out at 20 C.F.R. 655.805.

C.F.R. 655.731(c)(6)(ii) ("Matters such as the worker's obtaining a State license would not be relevant to [the] determination [of whether the nonimmigrant is eligible to work for the employer]."). Indeed, the requirement to pay unlicensed H-1B workers provides the employer an incentive to hire licensed U.S. workers.[20] As noted previously, all of the doctors did eventually obtain their Tennessee licenses and other required credentials (D & O 74-75).

Additionally, the employer's reliance on Matter of Izummi, Interim Decision #3360 (July 13, 1998) is misplaced. In Izummi, the INS Associate Commissioner for Examinations affirmed the denial of a petitioner to be classified as an alien entrepreneur pursuant to section 203(b)(5) of the INA, 8 U.S.C. 1153(b)(5) and section 610 of the Appropriations Act of 1993. Rejecting an argument that it was estopped from denying petitions identical to those previously approved, the decision stated that the Supreme Court has never upheld a claim of estoppel against a Government agency (Izummi at pp. 24-25, 34-36). See also INS v.

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[20]Unlike U.S. workers, "unemployed" H-1B workers are without any means of support in this country -- they can only seek a job from an LCA-certified employer who files a petition for the worker, or with another employer who is able to provide some other adjustment of the nonimmigrant's status under the INA. They are not eligible for federal programs such as Food Stamps or Aid to Families with Dependent Children.

Hibi, 414 U.S. 5, 8 (1973) ("'As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. . . .'") (quoting Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917)).

Finally, the employer apparently seeks to have DOL and INS share in liability for payment of the back wages. This would be contrary to the Appropriations Clause of the Constitution, U.S. Const. art. I, §9, cl. 7, which provides that: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." See Office of Personnel Management v. Richmond, 496 U.S. 414, 423-424 (1990) ("Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute."). There is no statutory authority which provides the Labor Department or INS with funds to pay back wages on behalf of a private H-1B employer.

D. The ALJ properly awarded business expenses incurred by the doctors in order for Dr. Kutty to obtain H-1B visas and the doctors to obtain related J-1 waivers.

The regulations state that in order to satisfy the required wage obligation,

> [t]he required wage rate 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.

20 C.F.R. 655.731(c)(1)(1995).[21]

In this case there is no doubt that the employer paid the H-1B doctors less than the required wage rates.[22] Therefore, payment by the doctors of the employer's business expenses, i.e., the costs and fees for obtaining H-1B visas and J1 waivers, necessarily depressed the workers' wages below the required wage rate, and must be reimbursed in full (D & O 71).

20 C.F.R. 655.731(c)(7) allows the employer to take deductions that meet certain criteria, such as deductions required by law or a collective bargaining agreement. See 20 C.F.R. 655.731(c)(7)(i) and (ii). Deductions that are "a recoupment of the employer's business expense" are not permitted. 20 C.F.R. 655.731(c)(7)(ii) and (iii)(C)(1995). The regulations further provide that:

> [w]here 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

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[21]The deductions at issue were taken while the 1995 regulations were in effect. The amended regulation has not changed this requirement. See 20 C.F.R. 655.731(c)(1)(2001).

[22]In all cases, the prevailing wage was higher than the doctors' actual wage during the period that the doctors paid the employer's business expenses (D & O 75-83). Hence, the prevailing wage rate was the required wage rate.

> 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.

20 C.F.R. 655.731(c)(9)(1995); 20 C.F.R. 655.731(c)(12)(2001).

The revised regulations state that "business expenses" include "attorney fees and other costs connected to the performance of 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)(iii)(C). As noted by the ALJ,

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

D & O 71. Therefore, the language in the revised regulations quoted above applies with equal force to the applicable 1995 regulations.

The commentary to the new regulations further identifies when attorney's fees may or may not be considered an employer's business expense. Specifically, an H-1B worker is permitted to pay the expenses for counsel who is clearly providing legal advice personal to that worker; however, the employer may not

pass its legal costs associated in any way with the LCA and petition on to the employee. Indeed, in an enforcement proceeding, the Department "will look behind any situation where it appears that an employee is absorbing an employer's business expenses." 65 Fed. Reg. 80199-80200 (December 20, 2000).

The employer contends that the attorney's fees should not be awarded at all as part of the back wages, because the attorneys were representing the doctors personally (Pet. Br., pp. 16-17). This contention is not supported by the record. Attorney Kalina Sarmov performed the H-1B work with respect to most of the doctors, whether as Kutty's in-house counsel or "independently," often pursuant to Dr. Kutty's direction to the H-1B doctors[23] (e.g., Tr. 294-295, 665-679, 922, 982-990, 994-995, 1109, 1440, 1582, 1971, 2159-2160, 2213-2214).[24] In some cases, the doctors retained other counsel. In all of these situations, the attorneys were simply performing the employer's required work -- doing what was necessary to file the LCAs and/or H-1B petitions. See, e.g., GX 23 at 33 (private attorney

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[23]Dr. Kutty knew that Ms. Sarmov was charging the doctors a separate fee to perform the H-1B work, yet told them they needed to use her services (GX 1 at 170).

[24]Dr. Casis wanted to employ his own attorney to negotiate a contract change, but Ms. Sarmov told him "Dr. Kutty wants his own lawyer to handle everything." Tr. 990.

performed the required LCA and H-1B petition work and sent detailed instructions to Dr. Kutty about where to sign and what he must do to comply with the law); GX 17 at 31 (private attorney's invoice initially sent to Dr. Kutty); GX 16 at 29-32 (private attorney billing for H-1B visa work). The ALJ specifically noted that where additional work personal to the doctors was provided at charge, i.e., not an actual business expense, it was not included in the back wage calculations (D & O, 72).

The employer also contests the ALJ's award of costs incurred by the doctors in obtaining their J-1 waivers (Pet. Br., p. 15).[25] While these costs are not included or excluded as an example of a business expense in the amended regulations, obtaining the waiver is integral to obtaining the H-1B visa.[26] The employer cannot file the petition unless the employee has

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[25]The employer referred most of the doctors to HealthIMPACT to complete the paperwork necessary for obtaining the J-1 waiver. While the ALJ found that there is little information in the record about HealthIMPACT, one doctor testified that Dr. Kutty told him that he must use HealthIMPACT because they are Dr. Kutty's business partner (D & O 17, Tr. 298). Another doctor testified that Dr. Kutty told him that his contract might be "revoked" if he did not use HealthIMPACT's services for his J-1 waiver (Tr. 2350-2352).

[26]Certification of the LCA and approval of the H-1B petition are issued to the employer; approval of the J1 waiver is issued to the employee (D & O 71).

the waiver. See 8 U.S.C. 1182(e), 1184(l)(1)(B), 1101(a)(15)(H)(i)(b); D & O 72; Tr. 719; GX 11-A at 10, Part 3. Moreover, the employer plays a pivotal role in the employee's ability to obtain the waiver. To participate in the State 20 program, the employer must meet specific guidelines and apply on behalf of the particular participant.[27] This is amply illustrated in the record. For example, Dr. Kutty sent letters and/or contracts in support of the J-1 waiver to the Tennessee Department of Health on behalf of Doctors Khan, Speil, and Chintalapudi (GX 19 at 32, GX 49, GX 78 at 6). Dr. Ahmed could not obtain a J-1 waiver in Florida because Dr. Kutty did not comply with federal guidelines (GX 11 at 29; Tr. 715-726). Dr. Naseem was told by Dr. Kutty's office that there were only two positions left in Tennessee's State 20 program, and that if he quickly signed the employment contract "they could apply for the waiver." (Tr. 1104). Dr. Kutty told Dr. Ilie and his wife, Dr. Ionescu, that he is working with a lawyer in Tennessee who will contact them to help with the State 20 position (Tr. 1585).

The employer's role in the interaction between obtaining

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[27]According to the State Department's website, the employer must provide a letter that it wishes to hire the physician, and enter into a contract for no less than 40 hours per week for three years with the physician. See http://travel.state.gov/jvw.html. (Frequently Asked Questions).

the J-1 waiver and receiving the H-1B visa stamp is also illustrated in the record. See GX 11-A at 3 and GX 27 at 33 (letters from Dr. Kutty to U.S. Embassies citing that clinic has been designated a "Health Professional Shortage Area" in support of obtaining H-1B visas for Doctors Ahmed and Venkatesh); GX 11-A at 5 (letter from Attorney Sarmov to U.S. Embassy regarding misfiling of Dr. Ahmed's original Approval Notice of the Application to Waive Foreign Residency Requirement).

Finally, the employer argues that the ALJ erred in awarding business expenses because she incorrectly determined the back wages "upon the use of actual mean wage and not upon the prevailing wage." Hence, "an award of Business Expenses in addition to the actual mean wage would result in the alien doctors obtaining more backwages than they are entitled." (Pet. Br., pp. 17-18). To the contrary, the ALJ used the correct figures to determine the applicable prevailing wage. Specifically, 12 LCAs indicate that the listed prevailing wage rate was obtained from the "SESA" (State Employment Security Agency). In those instances, the ALJ used the SESA rates as listed by the employer on the LCAs (D & O 69, 75-83). Indeed, the regulations declare the SESA rate to be the most reliable prevailing wage indicator, and DOL is required to accept the

SESA rate. See 20 C.F.R. 655.731(a)(2)(iii)(A) and (a)(2)(iii)(A)(3)(1995) and (2001). Moreover, once the employer obtains a prevailing wage determination from the SESA and files an LCA supported by that prevailing wage determination, the employer is deemed to have accepted the prevailing wage determination and thereafter may not contest its legitimacy. See 20 C.F.R. 655.731(a)(2)(iii)(A)(1)(1995) and (2001).[28]

On the remaining LCAs, the employer indicated either the 1998 Salary Assessor or the Economic Research Institute ("ERI") as the prevailing wage source. The 1998 Salary Assessor was issued by ERI, and was provided to the DOL investigator by the employer (GX 27 at 17; GX 27-A). This survey, considered an "independent authoritative source" under the regulations,[29] provides a "Range Minimum," "Mean," and "Range Maximum" for one, twelve, and twenty four years of experience. DOL relied on this

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[28]Under the 1995 regulations, the employer is deemed to have accepted the prevailing wage determination both as to the occupational classification and wage. Under the 2001 regulations, the employer is deemed to have accepted the prevailing wage determination as to the amount of the wage. In this case, the LCAs were filed while the 1995 regulations were in effect.

[29]An "independent authoritative source" is a "survey of wages published in a book, newspaper, periodical, loose-leaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's application." 20 C.F.R. 655.731(b)(3)(iii)(B) (1995) and (2001).

prevailing wage source provided by the employer, and then appropriately selected the mean rate for one year of experience,[30] because the regulations require that the independent authoritative source reflect the "average wage" paid to similarly employed workers. See 20 C.F.R. 655.731(a)(2)(iii) and (b)(3)(iii)(B)(*1*)(1995) and (2001).[31] (D & O 69, 75-83; Tr. 91, 2568-2569, 2573-2574).

E. Dr. Kutty and the corporate entities retaliated against the H-1B doctors in violation of the INA.

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 . . . 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). See also 20 C.F.R. 655.801. This provision is similar to those in various other whistleblower

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[30]Each of the doctors had at least one year experience working as a doctor (D & O 17, 19, 22, 32, 36).

[31]The 2001 regulations require that the survey reflect the "weighted average wage."

protection statutes administered by DOL, and the same principles apply. See 65 Fed. Reg. 80178 (2000).[32]

Under the applicable burdens of production in whistleblower proceedings, an employee must initially present a prima facie case, showing that (1) the employer is covered by the Act, (2) the employee engaged in protected conduct, (3) the employer was aware of that conduct, (4) the employee suffered adverse action, and (5) there is an inference of causation between the protected activity and the adverse action. Proximity in time is sufficient to raise an inference of causation. See Bartlik v. United States Department of Labor, 73 F. 3d 100, 103, n.6 (6th Cir. 1996); Kahn v. Secretary of Labor, 64 F.3d 271, 277 (7th Cir. 1994); Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989). Once the employee makes a prima facie showing, the burden of production shifts to the employer to produce evidence that its action was motivated by a legitimate, non-discriminatory reason. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Kahn, 64 F.3d at 278. If the employer meets its burden of production, the presumption raised by the prima facie case

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[32]Precedent under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. 2000e et seq., and other discrimination statutes is also relevant. See Overall v. Tennessee Valley Authority, ARB Nos. 98-111, 98-128, at *12 (April 30, 2001), aff'd, No. 01-3724 (6th Cir. March 6, 2003); D & O 83-84.

disappears from the case, and "the factual inquiry proceeds to a new level of specificity." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981). The focus then shifts to the employee who bears the burden to prove, by a preponderance of the evidence, that the proffered reason is merely a pretext and that the real reason for the adverse action was retaliation for the protected activity. "[T]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993) (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 253)). See also Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142-143 (2000).

If the trier of fact concludes that the employer was motivated by both prohibited and legitimate reasons, i.e., that the employer had "dual motives," the burden of persuasion shifts to the employer to demonstrate that it would have taken the same unfavorable personnel action in the absence of protected conduct. See Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274, 287 (1977); Kahn, 64 F.3d at 277 (burden shifts to the employer "once the plaintiff has shown that the protected activity 'played a role' in the employer's decision")

(quoting Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1163-1164 (9th Cir. 1984)); In the Matter of Milton Timmons v. Franklin Electric Cooperative, 1998 WL 917114 at *3 (ARB Dec. 1, 1998).[33]

In this case, the ALJ found that there was direct evidence of the first act of discrimination -- ceasing salary payments to the doctors represented by Mr. Divine following receipt of the February 14, 2001 letter demanding immediate payment of all amounts due (D & O 84-86). Specifically, Dr. Kutty admitted at trial that he ceased paying salaries to the doctors because they sent the February 14, 2001 demand letter (Tr. 2756). Dr. Kutty made payments to the doctors who did not complain (Tr. 1001,

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[33]On January 10, 2003, the Supreme Court granted certiorari in a case in which the Ninth Circuit held that Title VII does not require plaintiff to present "direct evidence" of discrimination to trigger application of the mixed motive analysis of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). This case also raises the issue of the appropriate standards for lower courts to follow in making a direct evidence determination in mixed motive cases under Title VII. See Costa v. Desert Palace, Inc., 299 F.3d 838, 853-854 (9th Cir. 2002), cert. granted, 123 S. Ct. 816 (Jan. 10, 2003) (No. 02-679). As will be shown infra, the first act of retaliation was entirely motivated by discriminatory animus. There is sufficient direct evidence of retaliation that triggered the ALJ's mixed motive analysis in regard to the second act of retaliation irrespective of the definition one applies, i.e., there was evidence directly related to the decision-making process that led to the adverse employment action. There is nothing at all "inferential" about that evidence. Therefore, the outcome of Costa is not critical to deciding the instant case.

2196; GX 12 at 29 and 36; GX 18F; GX 81). Additionally, Dr. Kutty sent accusatory letters only to doctors identified in the demand letter (D & O 74). Dr. Kutty adduced no probative evidence refuting this direct evidence of retaliation. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121-125 (1985).[34]

A prima facie case was established with respect to the second discriminatory act -- terminating the doctors: (1) the employer is covered by the INA's anti-retaliation provision by virtue of being an H-1B employer; (2) the employees engaged in protected activity by filing a complaint with DOL on February 28, 2001[35]; (3) the employer knew about the protected activity. Dr. Kutty knew that the doctors complained to DOL, because the February 14, 2001 demand letter states that DOL will be notified if wages are not paid. Dr. Kutty did not pay wages and indeed, less than five weeks later (prior to the doctors being terminated), DOL notified Dr. Kutty that it would be conducting

[34]Even if a mixed motive analysis were to be applied to the first act of discrimination, Dr. Kutty did not meet his burden of proving that he would have stopped salary payments in the absence of receiving the demand letter from Attorney Divine.

[35]The demand letter regarding Doctors Rohatgi and Haque were faxed to Dr. Kutty on March 21, 2001 (D & O 63; GX 34). They complained to DOL at the same time (D & O 63; Tr. 935; GX 15 at 8; GX 25 at 7).

an investigation. Additionally, one of Dr. Speil's patients testified that Mr. Hooli, Dr. Kutty's administrator, told her that the doctors had turned them in to "the labor board." (Tr. 2035). Hence, the ALJ correctly held that "[w]hether or not [Mr. Hooli] and Dr. Kutty had actually seen the [complaint] letter, I infer that they blamed Mr. Divine's clients for instigating the investigation" (D & O 86); (4) adverse action was taken -- Dr. Kutty fired seven doctors following the DOL investigation; (5) there is an inference of causation between the adverse action and the protected activity because of the close proximity in time between them. Dr. Kutty fired the doctors on the very day that the DOL investigation began, just two days after receiving word of the impending investigation from DOL.[36] Those who did not complain were not fired.

The employer claimed several legitimate, "non-retaliatory" reasons for firing the doctors: they were underperforming; the Wage Hour investigator told him he could fire the doctors; and he did not have the finances to retain the doctors (D & O 86-88, Pet. Br., pp., 18-21).

The ALJ found that the doctors were not underperforming (D & O 73-74, 87). Clearly, this finding is supported by

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[36]Dr. Haque was fired the same day that Dr. Kutty received his demand letter (D & O 63).

substantial evidence and the employer's proffered reason is pretextual. For example, Mr. Hooli told 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. 2705-2707, D & O 13, 73-74). Mr. Hooli even admitted to Dr. Naseem that "there was no investigation done and if this thing goes to the court that he will have to lie for his friend . . . Dr. Kutty." (Tr. 1210).[37] Dr. Kutty and Mr. Hooli accused some of the doctors of earning extra money moonlighting for local hospitals; however, the testimony and documentary evidence shows that the doctors worked in emergency rooms at the request of Dr. Kutty, and payment for their services went to the clinics (D & O 16, 73-74). The doctors' emergency room work helped to build up the practices. Id. Additionally, one of the clinic office managers was fired for "covering up for the doctors," and was then offered reinstatement with a raise if she would write a letter stating that the doctors were not in the office to see patients. She refused because it wasn't true (D & O 44, Tr. 1290-1292, 1557-

[37]Dr. Chintalapudi testified that Dr. Kutty "did not even try to attend the Tazewell office to solve the differences or problems over there" (Tr. 2398-2399, D & O 21).

1558, 1927-1928, GX 1 at 233).

Dr. Kutty never issued a written reprimand to any of the doctors before he received the demand letter from Attorney Divine, and many of the doctors testified that Dr. Kutty had never said anything critical either (GX 1 at 222; D & O 27-28, 34, 40-41, 45; Tr. 1501-1503, 1613-1615, 1676, 1736-1740, 1932-1933, 2277-2278). In fact, Dr. Kutty raised Doctors Ilie and Ionescu's rate of pay to $80,000 per year in July 2000, and admitted that Dr. Speil met his obligations to the clinic (D & O 28, 44; Tr. 1613-1615, 1736-1740; GX 1 at 30, 34).

Moreover, the record is replete with evidence about the hard work performed by the H-1B doctors. They worked diligently to establish the clinics, often starting with no patients, and building up a significant caseload. They engaged in many activities to promote the clinics, such as starting a continuing medical education program, attending health fairs, providing consultations at hospitals, and giving lectures. They were very attentive to their patients. See D & O 18, 27-33, 37-38, 43-46, 48-50, 63. One patient credited Doctors Naseem and Speil with saving her life when they treated her for a previously wrongly-diagnosed heart problem (Tr. 2028).[38]

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[38]Dr. Kutty attempted to blame Dr. Naseem for not using certain cardiology equipment, but the ALJ found that equipment

The ALJ similarly rejected Dr. Kutty's claim that the Wage Hour Investigator told him he could fire the doctors, and credited the investigator's testimony that she did not tell him this (D & O 64-65; 87-88; Tr. 2066-2067).

The ALJ determined, using the "mixed motive" analysis, that the employer could not show that he would have terminated the employees had they not written the demand letter and filed a complaint with DOL:

> Putting Dr. Kutty's testimony in the best light, even if I conclude that he misunderstood what [the investigator] 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.

(D & O, 88).

First, the ALJ need not have reached the issue of mixed motive analysis since the evidence shows that the employer's excuses were pretextual. Even assuming arguendo that a mixed motive analysis is appropriate with respect to the second discriminatory act, the record evidence discussed above supports the ALJ's conclusion that Dr. Kutty did not prove that he would

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and construction problems pointed out by Dr. Naseem were legitimate (D & O 51).

have fired the doctors even if they had not complained to him and DOL. In this regard, Dr. Kutty's testimony regarding the demand letter provides direct evidence that the terminations were discriminatory, since writing the demand letter contributed first to the salary cessation, and ultimately to the terminations. <u>See</u> n. 33 <u>supra</u>. The ALJ found that the termination decision was "inextricably linked" to both protected activities -- writing the demand letter and filing the complaint.

The employer contends that the ALJ's conclusion "would eliminate an employer's right to ever terminate an H-1B employee and instead require an employer to continue to retain an H-1B visa holder as long as they were in H-1B visa status, without exception." (Pet. Br., p. 20). The ALJ's conclusion does no such thing. Rather, the ALJ considered the employer's arguments pursuant to established retaliation law. She assumed that financial difficulties were a contributing factor in the terminations, but the employer was unable to persuade her that he that he would have fired the doctors in the absence of complaining to DOL. Indeed, Dr. Kutty hired the workers with the intent of paying them less than the required wage rate

(e.g., GX 1 at 17; Tr. 1439).[39] An employer who hires H-1B workers knowing that he cannot pay them the required wage rate, and then fires them when they finally invoke the INA protections, should not be permitted to use his financial woes as a shield from liability.[40]

F. The corporate veil was properly pierced, and therefore Dr. Kutty is personally liable for the violations.

Under the INA, the entity which lists itself as the employer and files the LCA is the liable party. See Administrator v. Native Technologies, Inc., ARB Case No. 98-034 at pp. 7-8 (May 28, 1999). In the present case, the various corporate entities were listed as the employers on the LCAs (D &

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[39]The employer intimates that he was unaware of his obligation to pay the prevailing wage prior to the DOL investigation (Pet. Br. pp. 19-20). The ALJ found otherwise (D & O 90-91). Not only did Dr. Kutty sign the attestations on the LCAs and petitions, but private attorneys explicitly informed him about his obligation to pay the required wage rate (GX 23 at 33-43 and GX 67). Additionally, Dr. Kutty sent letters to embassies in support of obtaining the doctors' visas, in which he claimed that he would be paying a wage much higher than what he intended to pay. See e.g., GX 26 at 29, GX 1 at 212 & GX 19 at 49. Furthermore, assuming arguendo that Dr. Kutty never read any of the documents that he signed, he cannot rely on his negligence in this regard as a basis for avoiding his obligation to pay the prevailing wage. See Administrator v. Jackson, ARB Case No. 00-068 (April 30, 2001).

[40]The employer further contends that termination was permitted by the employment agreements (Pet. Br., pp. 19-20). The H-1B employer is required to comply with the INA, regardless of what is stated in any employment agreement.

O 102-103).[41] The Administrator, however, submits that these entities served merely as a front for Dr. Kutty and should not serve to shield him from liability.

The Supreme Court has held that generally a corporate entity should be recognized. See Taylor v. Standard Gas Co., 306 U.S. 307, 322 (1939). However, under equitable principles, a corporate entity will not be recognized to limit liability "when to do so would work fraud or injustice." Id. The Supreme Court has cited "an obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking" as an important factor in denying corporate stockholders a limited liability defense. Anderson v. Abbott, 321 U.S. 349, 362 (1944).

The Sixth Circuit, where this case arises, has found it appropriate to "pierce the corporate veil" under federal law after weighing: "(1) the amount of respect given to the separate entity of the corporation by its shareholders; (2) the degree of injustice visited on the litigants by recognition of the

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[41]In addition to Dr. Kutty, the Administrator named as Respondents those entities listed on the LCAs: Center for Internal Medicine and Pediatrics, Inc., Center for Internal Medicine, Center for Internal Medicine and Pediatrics, P.C., Center for Internal Medicine and Pediatrics, Sumeru Health Care Group, Inc., Sumeru Health Care Group, Sumeru Health Care Group d/b/a Center for Internal Medicine and Pediatrics (D & O 93-97, 98 n. 40; GX 30).

corporate entity; and (3) the fraudulent intent of the incorporators." Laborers' Pension Trust Fund v. Sidney Weinberger Homes, Inc., 872 F.2d 702, 704-705 (6th Cir. 1988) (citing Seymour v. Hull & Moreland Engineering, 605 F. 2d 1105, 1111 (9th Cir. 1979)). Relevant factors include "undercapitalization of the corporation, the maintenance of separate books, the separation of corporate and individual finances, the use of the corporation to support fraud or illegality, the honoring of corporate formalities, and whether the corporation is merely a sham." Id. at 704-705 (citing Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc., 519 F. 2d 634, 638 (8th Cir. 1975)). No one factor is a prerequisite to a finding that the corporate form has been violated. Id. at 705. Additionally, "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 or 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." Federal Deposit Insurance Corporation v. Allen, 584 F. Supp. 386, 397-398 (E.D. Tenn.

1984).[42]

In an analogous case, the Sixth Circuit, applying relevant state law, upheld a district court's piercing of the corporate veil and holding officers and directors of a corporation liable for civil penalties assessed against the corporation under the Federal Mine Safety and Health Act. See United States v. WRW Corporation, 986 F.2d 138, 143 (6th Cir. 1993).[43] In that case,

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[42]The district court also listed the following factors to be considered:

> (1) whether there was a failure to collect paid in capital; (2) whether the corporation was grossly undercapitalized; (3) the nonissuance of stock certificates; (4) the sole ownership of stock by one individual; (5) the use of the same office or business location; (6) the employment of the same employees or attorneys; (7) the use of the corporation as an instrumentality or business conduit for an individual or another corporation; (8) the diversion of corporate assets by or to a stockholder or other entity to the detriment of creditors, or the manipulation of assets and liabilities in another; (9) the use of the corporation as a subterfuge in illegal transactions; (10) the formation and use of the corporation to transfer to it the existing liability of another person or entity; and (11) the failure to maintain arms length relationships among entities.

Allen, 584 F. Supp. at 397.

[43]The Sixth Circuit has thus also applied state law in determining whether to pierce the corporate veil even where a federal statute is at issue. See also Longhi v. Animal and Plant Health Inspection Service, 165 F.3d 1057, 1061 (6th Cir. 1999)(Animal Welfare Act); United States v. Cordova Chemical Company of Michigan, 113 F. 3d 572, 580 (6th Cir. 1997)(en

the corporation was never sufficiently capitalized and operated at a loss during its two years of active existence. The court stated that the fact that there was no evidence that the individual defendants siphoned off corporate funds or the fact that the corporation never distributed dividends to the individual defendants did not mitigate against piercing the corporate veil.[44] The court also concluded that the district court was not required to "wade through" the record for specific facts when the defendants made a general allegation that they had observed corporate formalities. It was further noted that the individual defendants had commingled funds with the corporation and had guaranteed the corporation's liabilities in their individual capacities.

Although not necessarily controlling in this case, it is noteworthy that Tennessee courts have concluded that the determination of whether to pierce the corporate veil is

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banc)(CERCLA), vacated on other grounds sub nom. United States v. Bestfoods, 524 U.S. 51 (1998). Irrespective, however, of whether state law or federal law is applied to the issue of piercing the corporate veil in the present case, the outcome would be the same.

[44] See also Edelweiss Manufacturing Co., Inc., 87-INA-562 at p. 4 (March 15, 1988) (en banc) (Board of Alien Labor Certification Appeals held that it is not bound to find fraud or sham in order to look behind the corporation to determine the validity of its actions, particularly in matters affecting the public interest in matters such as labor law).

"particularly within the province of the Trial Court." Muroll Gesellschaft M.B.H. v. Tennessee Tape, Inc., 908 S.W. 2d 211, 213 (Tenn. Ct. App. 1995). Piercing the corporate veil may be appropriate "when the corporation is liable for a debt but is without funds due to some misconduct on the part of the officers and directors," or "in the furtherance of the ends of justice." Id. "Generally, no one factor is conclusive." Id. Accord VP Buildings, Inc. v. Polygon Group, Inc., 2002 WL 15634 at *4; (Tenn. Ct. App. 2002) (citing Murroll and upholding piercing, in part, because there was little documentary evidence demonstrating how the corporation transacted business); Emergicare Consultants, Inc. v. Woolbright, 2000 WL 1897350 at *2, *4 (Tenn. Ct. App. 2000) (court also considers factors listed in Federal Deposit Insurance Corporation v. Allen, supra.). See also Oak Ridge Auto Repair Service v. City Finance Company, 425 S.W. 2d 620 (Tenn. Ct. App. 1967) (corporate veil pierced when corporation did not act separately and apart from its sole stockholder/owner).

In this case, the ALJ properly considered the relevant factors and found it appropriate to pierce the corporate veil. She initially observed that "[t]he record discloses a confusing web of corporations owned and operated by Dr. Kutty with some

connection to the H-1B workers in this case." (D & O 94). Indeed, at least a dozen variations of "Sumeru Health Care Group" and "Center for Internal Medicine and Pediatrics" appear on the H-1B petitions, LCAs, employment agreements, paychecks and W-2s (D & O 94-97). At deposition, Dr. Kutty agreed that he asked his attorney to "just set me up some companies to run some clinics in Tennessee," and that he owned 100% of all of the entities (GX 1 at 57; D & O 94).[45]

The ALJ stated that "various documents signed by Dr. Kutty have confused the issue of which corporate entities were acting as the H-1B doctors' employers." (D & O 98-99). For example, "Sumeru Health Care, Inc." issued paychecks for 15 of the 17 doctors before and after the Tennessee corporation with the same name dissolved (D & O 97). "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 eight of the doctors (D & O 98). 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 ten H-1B petitions (D & O 99). See also Chart, pp.

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[45]Dr. Kutty's wife had no ownership interest, except that some of the Florida clinics were owned jointly by Doctor and Mrs. Kutty as tenants in the entirety (D & O 94; GX 1 at 57-59, 140).

94-97. Indeed, as noted by the ALJ, "[t]he assets of the various corporations were interchangeable, and dealings were not at arms' length" (D & O 101). Little respect was given to the corporations' separate identities.[46]

The ALJ specifically concluded that "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." (D & O 101; Tr. 2767). In fact, Dr. Kutty testified that "Sumeru Healthcare Group, LLC is just me. Maya Healthcare is just me. Sumeru, Inc. is just me. And Center for Internal Medicine and Pediatrics in Maynardsville is just me." (GX 1 at 58; Tr. 2827). He explained that he was president of the Tennessee companies, that the Tennessee clinics are owned by entities that are ultimately owned completely by him, that he is the only "member" of these entities, and that he doesn't have to report to anyone else in relation to these entities. (GX 1 at 59, 96; D & O 101).

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[46]Dr. Kutty's office and the corporate offices were located in the same facility in Hudson, Florida (D & O 101; GX 1 at 4). Dr. Kutty's in-house lawyer, Ms. Sarmov, performed the legal work for all the entities (GX 1 at 78). The Florida office handled administration for all of the Florida and Tennessee operations (GX 1 at 73). Billing for the companies was centralized, and controlled by Dr. Kutty (D & O 101; GX 1 at 21). Some of the corporations even had the same tax ID number (GX 1 at 192).

Although Mrs. Kutty was listed as a director in some corporate records, Dr. Kutty testified that he made all the decisions for the corporate entities (D & O 101; GX 1 at 46-48; Tr. 2827-2828).

The corporate form was also ignored. Despite the fact that Dr. Kutty was the sole owner of the companies, he largely denied any specific knowledge of how the businesses were organized and interacted, or the formalities of corporate governance (D & O 94; GX 1 at 96-98). There is no evidence that stock certificates were issued for any of the corporations, nor did Dr. Kutty know whether the corporations had a board of directors, or if financial statements were ever issued (D & O 101; GX 1 at 96-97). Indeed, no internal corporate records such as minutes or financial records were produced (D & O 16, 97). There were no formal corporate meetings, other than meetings with Doctor and Mrs. Kutty, and Ms. Sarmov when she was there. Dr. Kutty was sure that Ms. Sarmov "used any day she wanted as the specific day that the board met." (GX 1 at 96-98). He also testified that whenever there was a need to create a corporate legal document, he would just execute it on behalf of whichever company was involved (GX 1 at 97). Dr. Kutty could not state how much money was used to start the clinics, or whether money

was contributed as capital or loans, or if he contributed any amount of money as the sole shareholder in return for his ownership interest (D & O 101; GX 1 at 84, 86, 96).

The ALJ also found that Dr. Kutty "freely treated and shared personal and corporate assets as his own." (D & O 101). He could not state what his income has been in recent years and he does not read his tax returns (D & O 101; Tr. 90-92). Dr. Kutty stated that he was supposed to be paid $100,000 per year, but that he has not received a salary for the past two to three years.[47] Instead, he has received about $50,000 per year in pay-backs for loans he has made to his Florida companies.[48] His wife earned an annual salary of $50,000. (D & O 15, 101; GX 1 at 14, 84-86, 90-92). Dr. Kutty has no personal assets, except for his house which is jointly owned by his wife (D & O 101; GX 1 at 138). He has no savings accounts, checking accounts, credit cards, stock portfolio, or foreign assets. His wife gets cash from one of the company offices to give to him (D & O 101; GX 1, pp. 138-142). One of the corporate entities owns his Lexus automobile and cellular phone (GX 1 at 138, 141).

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[47]At one point, Dr. Kutty stated that he is supposed to be paid $100,000 biweekly (GX 1 at 85).

[48]Dr. Kutty also testified that when the Florida companies repaid loans, he "directed them to the Tennessee operation." (D & O 15; GX 1 at 84-86).

The corporations were undercapitalized and operated at a loss (D & O 101). Dr. Kutty established the corporations with the idea that they would not generate sufficient income to properly pay the doctors for three to five years (D & O 91; GX 1 at 17, 66-67, 158-161, 207-217). He knowingly paid the doctors "half the rate" (Tr. 1439, 2750-2751). He testified that the "finances [were] not there in the company." (GX 1 at 41). He could not say how much money was used to start the clinics (D & O 101; GX 1 at 84). The Tennessee corporation, Sumeru Health Care Group, Inc., was dissolved in September 2000, while the doctors were still employed (D & O 97; GX 2). By the time of the hearing, none of the Tennessee corporations were operating (Tr. 2743).

The ALJ concluded that piercing the corporate veil "is necessary to do justice for the H-1B employees" (D & O 101). Additionally, "Dr. Kutty's corporations had no mind, will, or existence of their own, and his domination was used to perpetrate violations of statutory duties" (Id.). Indeed, the doctors cannot recover their back wages from the inoperative Tennessee corporations. Moreover, the Board should not place its imprimatur on Dr. Kutty's creation of corporations to shield him from liability for knowingly violating the Immigration Act.

Dr. Kutty's actions defeated the legislative policies that underlie the INA, by driving down U.S. workers' wages. Additionally, it is against the national interest to use the INA to knowingly employ aliens illegally. Should Dr. Kutty not be held personally liable, he can start the whole process over again by filing new H-1B petitions. On the other hand, if the veil is pierced, Dr. Kutty will be debarred from the H-1B program for at least two years (D & O 101). See 8 U.S.C. 1182(n)(2)(C)(ii).[49]

Dr. Kutty argues that he "acted in good faith" and "is as much a victim in this case as any of the alien doctors." He explains that he trusted the company's legal counsel to advise him of the H-1B laws and was "unknowingly duped." (Pet. Br., p. 25). Dr. Kutty's claims are without merit. The Tennessee corporations were set up by Ms. Sarmov at Dr. Kutty's initiative and direction (GX 1 at 14, 42, 48, 57; Tr. 2827-2828). Dr. Kutty dominated the corporations and made all the decisions

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[49]If the corporate veil is pierced, Dr. Kutty clearly is the employer responsible for the violations. The ALJ found that Dr. Kutty is the employer under the regulations, and this finding has not been appealed (D & O 101-103). Dr. Kutty hired each doctor, decided how much they would be paid, withheld their salaries, and terminated them (GX 1 at 31, 37, 42-43, 46-48, 62, 156-157, 193; Tr. 2751, 2755-2756, 2827-2828). He signed the employment contracts as well as the paperwork for the Department of Labor, consular office, and the INS (D & O 102; GX 1 at 171; GX 11-27).

regarding the corporations. He received specific written advice from attorneys other than Ms. Sarmov about the INA requirements, and ignored it (D & O 91, GX 23 at 33-43; GX 67). He repeatedly signed contracts with the employees specifying a lower salary than the LCAs, and then proceeded to pay less than either rate, admitting he knew "right from the beginning" that the contract rate would not be paid (GX 1, 66). He punished employees who complained about his unfair and illegal treatment of them by threatening them with deportation, not paying them, and ultimately terminating them (D & O 40, 47; Tr. 131, 303-306, 2261, 2734).[50]

In conclusion, the ALJ properly held that piercing the corporate veil is appropriate. Dr. Kutty created and controlled various interchangeable, undercapitalized entities, to

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[50]Dr. Kutty also claims that he "assisted the DOL investigator and made all of his records available to him whenever requested" (Pet. Br., p. 25). In fact, the ALJ held that the employer violated the H-1B regulatory requirement to maintain payroll records and the requirement to maintain documents for public examination (D & O 88-90). See 20 C.F.R. 655.731(b)(1) and 655.760. Despite the fact that prior to the investigation, the investigator provided notice of what she needed, she arrived to a room full of incomplete, disorganized records. She told Dr. Kutty what documentation he needed to obtain, and when she returned, she was still not provided the requested documentation. At the investigator's request, Dr. Kutty finally sent Attorney Sarmov a release permitting her to duplicate and send the records to the Wage Hour Investigator (D & O 64-66, 89; Tr. 2044-2056; GX 64; GX 65; GX 66; GX 82).

perpetuate violations of federal statutory duties.

CONCLUSION

For the reasons stated above, the Administrator respectfully requests that the Board affirm the ALJ's Decision and Order in its entirety.

Respectfully submitted,

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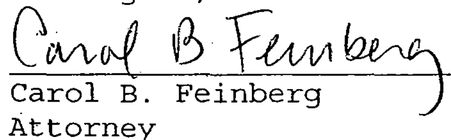

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