

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 05 March 2004**

CASE NO.: 2003-LCA-0022

*In the Matter of:*

**ADMINISTRATOR, WAGE & HOUR DIVISION, EMPLOYMENT STANDARDS  
ADMINISTRATION, U.S. DEPARTMENT OF LABOR,**  
Prosecuting Party,

v.

**SYNERGY SYSTEMS, INC.,**  
Respondent.

Appearances

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United States Department of Labor  
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For the Prosecuting Party

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For the Respondent

Before: Paul A. Mapes  
Administrative Law Judge

**DECISION AND ORDER**

The above-captioned matter arises from a determination issued on April 14, 2003 by the Administrator of the Department of Labor's Wage and Hour Division (hereinafter "the Administrator") under the provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1182(n), concerning labor condition applications for so-called "H-1B" visas.<sup>1</sup> In brief, the Administrator's determination concluded that the Respondent, Synergy Systems, Inc., owed back wages totaling \$23,455.81 to two former employees, Ramesh Balakrishnan and Durgesh Trimbakkar, because it failed to pay the full wages specified in a Labor Condition Application ("LCA"). In addition, the Administrator also found that the Respondent should pay a civil penalty of \$5,000 for willfully failing to pay any wages to these two former employees during certain "non-productive" times.

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<sup>1</sup> The Department of Labor's regulations concerning these provisions are set forth at 20 C.F.R. §§655.700 to 655.855 (2002).

Pursuant to the provisions of 20 C.F.R. §655.820, on April 29, 2003 the Respondent filed a timely request for a hearing concerning the Administrator's findings. Accordingly, a trial *de novo* was held in Long Beach, California, on July 8 and 9, 2003. Testimony was received from six witnesses and the following exhibits were admitted into evidence: Prosecuting Party's Exhibits (PX) 1-11, Respondent's Exhibits (RX) A-T, and Administrative Law Judge Exhibits (ALJX) 1-3.<sup>2</sup> As contemplated during the trial, the parties also submitted two post-trial declarations and a post-trial deposition. These materials have been admitted into evidence as ALJX 4 (post-trial declaration of Peter Jadav), ALJX 5 (transcript of the post-trial deposition of Dana Gonzales), and ALJX 6 (post-trial declaration of Vineeta J. Vibhakar). In addition, on August 2, 2003 the Prosecuting Party submitted a new exhibit which has been marked and received into evidence as PX 12. Finally, as determined during a September 28, 2003 telephone conference, three additional Respondent's exhibits have also been received into evidence: RX U (copy of two "Department of Labour" interview statements signed by Ramesh Balakrishnan on March 25, 2003), RX V (copy of a summary of information a Department of Labor investigator obtained from Durgesh Trimbakkar during a telephone interview on December 19, 2002), and RX W (copy of a summary of information obtained from Mr. Trimbakkar during a telephone interview on February 10, 2003).

On January 5, 2004, both parties submitted post-trial briefs. Because of questions about the authenticity of the "Department of Labour" interview statements signed by Mr. Balakrishnan (RX U), a telephone conference was held with the counsel to both parties on January 28, 2004. As a result of this conference, on February 2, 2004, the Prosecuting Party submitted an additional interview statement which has been marked and admitted into evidence as ALJX 7. In addition, during February 2004, the parties submitted supplemental post-trial briefs concerning a jurisdictional issue raised by the Respondent.

## **BACKGROUND**

The Respondent is a firm headquartered in Diamond Bar, California, that provides computer support services to other businesses. ALJX 6 at 10. Generally, the company's employees work at a client's job site and only training activities are performed in the Respondent's own offices. ALJX 1 at 8-11. The president of the Respondent is Vijju Motupolli and the company has assigned responsibility for human resources to Sachi Rao, who works in the Diamond Bar office with Ms. Motupolli. Tr. at 121, 277. Until the end of February of 2002 Synergy also had a northern California office in the city of Fremont. Tr. at 370. During the periods relevant to this case, Mohan E. Gnanadoss was the manager of that office. ALJX 1 at 6-7. He was responsible for seeking new business for Synergy and placing its employees on projects, but did not have the authority to negotiate the salaries of the workers he supervised. ALJX 1 at 45, 139. From approximately November 2000 to May 30, 2001, the receptionist in Synergy's Fremont office was Gita Rowlands. ALJX 2 at 8-9.

According to the testimony of Ms. Motupolli, since Synergy's inception in 1992 it has been the company's policy to pay salaries to the company's employees even during times when

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<sup>2</sup> ALJX 1 is the transcript of a deposition of Mohan E. Gnanadoss, ALJX 2 is the transcript of a deposition of Gita Rowlands, and ALJX 3 is the transcript of a deposition of Ramesh Balakrishnan.

the employees were “off project,” unless the employees were “on leave.” Tr. at 277, 294. She also testified that to the best of her knowledge none of the company’s former employees except Mr. Balakrishnan and Mr. Trimbakkar have ever complained about wage-and-hour violations or not being given copies of their LCA applications. Tr. at 277-78. In addition, Ms. Motupolli testified Synergy maintains a “public access” file in its Diamond Bar office that contains LCA and H-1B information on its employees. Tr. at 368.

The LCA that underlies this proceeding was submitted to the Department of Labor on May 18, 2000 by Ms. Motupolli. ALJX 6 at 4-5. The application sought certification to employ as many as 20 H-1B non-immigrants to work as programmer analysts in Alameda and Santa Clara counties in California and indicated that the prevailing wage rate for such workers was \$44,000 per year. The application was certified by a Department of Labor official on June 1, 2000. ALJX 6 at 5. The petitions for the issuance of H-1B visas to Mr. Balakrishnan and Mr. Trimbakkar were signed by Ms. Motupolli on February 21, 2001 and indicated that Mr. Balakrishnan and Mr. Trimbakkar would each be paid \$45,000 per year. ALJX 6. The petitions also indicated that Mr. Balakrishnan and Mr. Trimbakkar would begin working for Synergy on March 15, 2001. ALJX 6. According to a declaration submitted by Synergy’s outside counsel, Vineeta J. Vibhakar, she submitted these petitions to the INS on March 24, 2001. ALJX 6. In the declaration, Ms. Vibhakar further represented that at the same time she personally mailed complete copies of the petitions to Mr. Balakrishnan’s and Mr. Trimbakkar’s home addresses in the United States. ALJX 6. She also declared that neither of these mailings was returned to her.

### **Employment of Mr. Balakrishnan**

Mr. Balakrishnan is a citizen of India and has a degree in mechanical engineering from Bharathiar University. ALJX 6 at 20. He came to the United States in March of 2000 under an H-1B visa. ALJX 6 at 15. Mr. Balakrishnan’s testimony concerning his employment is disputed in many respects by the testimony of Mr. Gnanadoss and Ms. Motupolli. Summaries of this testimony and related exhibits are set forth below.

#### **1. Testimony of Mr. Balakrishnan**

During the middle of January 2001, Mr. Balakrishnan testified, Mr. Gnanadoss recruited him to work in Synergy’s Fremont office and told him he would be paid \$65,000 per year. ALJX 3 at 8-9, 13-14, 98. Mr. Balakrishnan further testified that although he was never given a written confirmation of that employment offer, he began working for Synergy in its Fremont office on February 1, 2001. ALJX 3 at 14-15. On February 7, 2001, Mr. Balakrishnan asserted, he was assigned by Synergy to begin performing programming work on the premises of a Synergy client known as Documentum. ALJX 3 at 14-15. Sometime during the middle of March, Mr. Balakrishnan recalled, Mr. Gnanadoss gave him his first pay, which was in the form of a Synergy check for \$1,500 that contained the words “advance loan.” ALJX 3 at 17-18, exhibit 1. About two weeks later, Mr. Balakrishnan testified, he received his first pay stub and a payroll check for \$1,368.61. ALJX 3 at 20-22, exhibit 2. The earnings statement that Synergy prepared for this check indicated that the check was a salary payment for the period between March 11 and March 24, 2001. PX 4 at 0. The statement also showed that \$1,000 had been deducted from the amount due as a partial repayment for the “advance loan.” PX 4 at 0.

At the end of March 2001, Mr. Balakrishnan testified, he completed his project for Documentum and returned to Synergy's Fremont office, where he was told by Mr. Gnanadoss that an effort was being made to find new projects for him to work on. ALJX 3 at 16, 24-26. However, Mr. Balakrishnan testified, no new projects were found for him until June 10 or 11, 2001. ALJX 3 at 27.

According to Mr. Balakrishnan, during April, May and the first part of June of 2001 he would report to Synergy's Fremont office on a daily basis and work for nine to ten hours a day on any tasks assigned to him by Mr. Gnanadoss. ALJX 3 at 27-28, 30-33, 115-16, 119-31. However, he asserted, he did not receive any paychecks for the period between May 6 and June 3, 2001. ALJX 3 at 29-30. This assertion is supported by Synergy payroll records showing that no salary payments were made to Mr. Balakrishnan during that period. PX 4. Mr. Balakrishnan further testified that he did not request or take any sort of leave from Synergy during this period. ALJX 3 at 33-34.

During the third or fourth week of May 2001, Mr. Balakrishnan testified, he received a call from Carl Watson of Intersect Consulting and spoke with Mr. Watson about working on a project for that company. ALJX 3 at 34-35, 117. According to Mr. Balakrishnan, he told Mr. Watson that he could start working on the project as soon as the next day. ALJX 3 at 34, 37-38. However, Mr. Balakrishnan testified, he did not in fact begin working on the Intersect project until June 11, 2001. ALJX 3 at 40.

Mr. Balakrishnan's testimony that he told Mr. Watson that he could immediately begin working on a project for Intersect is partially corroborated by the trial testimony of Mr. Watson. According to Mr. Watson, he recalls speaking to Mr. Balakrishnan in mid-May of 2001 and has the "impression" that Mr. Balakrishnan said he was then available to work on the Intersect project. Tr. at 77-79. As well, Mr. Watson testified that he cannot recall if anyone at Synergy ever told him that Mr. Balakrishnan was unavailable but that he is sure that no one told him that Mr. Balakrishnan was on leave. Tr. at 79-80. Mr. Watson also testified that he thinks that Mr. Balakrishnan did not start work on Intersect's project until June of 2001 because he was in the process of moving from northern California to southern California, where Intersect's office is located. Tr. at 80. However, Mr. Watson's testimony is not entirely consistent with a note that he faxed to Ms. Rao on May 23, 2001. RX C. In that note, Mr. Watson asked Ms. Rao to let him "know when Ramesh Balakrishnan will be returning" and commented that he wanted to know "when we can expect him to be available for work on our project." RX C. Mr. Watson's testimony is also inconsistent with the testimony of Ms. Rao, who asserted that she told Mr. Watson that Mr. Balakrishnan was on leave, based on information she obtained from Mr. Gnanadoss. Tr. at 128-29.

In any event, from June 11, 2001 to August 10, 2001, Mr. Balakrishnan worked on the Intersect project and was paid by Synergy during that entire period. ALJX 3 at 41. On the same day the Intersect project ended, Mr. Balakrishnan testified, he was called by Mr. Gnanadoss and told to begin working on another project for Documentum. ALJX 3 at 59-60. According to Mr. Balakrishnan's testimony, he continued working on that project until September 28, 2001. ALJX 3 at 61. Thereafter, he recalled, he was told by Mr. Gnanadoss to again start reporting to Synergy's office in Fremont. ALJX 3 at 62. For the next four weeks, Mr. Balakrishnan recalled, he went to the Fremont office each week day for approximately eight

hours a day. ALJX 3 at 62-64. During that period, he testified, he participated in interviews with potential clients and upgraded his computer skills. ALJX 3 at 63, 65.

On the morning of October 29, 2001, Mr. Balakrishnan testified, Mr. Gnanadoss asked him to sign a document purportedly requesting a leave of absence for the month of May. ALJX 3 at 66-68, 144. Mr. Balakrishnan stated that he refused to sign the request and about two hours later received a telephone call from Ms. Mottupalli, who told him that he would be fired if he didn't sign the leave of absence request. ALJX 3 at 67-71. Mr. Balakrishnan testified that he again refused to sign the document and asserted that he never again returned to work for Synergy. ALJX 3 at 71-72. Rather, he testified, he sent Synergy an e-mail requesting that he be paid past due wages and that he be given copies of his "visa papers" and Synergy's LCA. ALJX 3 at 72-73, 81-84, exhibit 15.

On October 31, 2001 Ms. Rao sent Mr. Balakrishnan a response to his e-mail. RX G. In the response, she asserted that his e-mail contained "several inaccuracies." In particular, she wrote, Synergy's attorney had confirmed that she had directly mailed to Mr. Balakrishnan "the original copy" of his H-1B visa and had also sent him a copy of the LCA after it she received it from the INS. RX G, Tr. at 139-40. Ms. Rao also disputed the assertion that Mr. Balakrishnan had been offered a \$65,000 annual salary and contended that he had been offered only \$45,000 per year. In addition, Ms. Rao contended that Mr. Balakrishnan had not started his employment at Synergy until February 8, 2001 and that his employment had ended on September 28, 2001. She further asserted that Mr. Balakrishnan had been on leave from May 6, 2001 to June 9, 2001 and had taken three days of vacation. RX G.

On November 1, 2001, Mr. Balakrishnan called the DOL and complained to Wage and Hour Division investigator Harry Hu about Synergy's alleged failure to pay him the full amounts that he believed he was owed. ALJX 7. According to Mr. Hu's written summary of his conversation, Mr. Balakrishnan complained that Synergy had not paid him the \$65,000 annual salary that was allegedly promised when he was hired. ALJX 7. Mr. Hu's summary further indicates that Mr. Balakrishnan also complained that he had not been paid anything for work he performed between February 1, 2001 and March 10, 2001, May 6 and June 2, 2001, and October 6 and 20, 2001. ALJX 7. In addition, Mr. Hu's summary notes that Mr. Balakrishnan alleged that he had not been given copies of his LCA or Synergy's petition for his H-1B visa. ALJX 7.

On November 5, 2001, according to Mr. Balakrishnan, he received from Synergy a Federal Express package that contained copies of the visa papers, the LCA, and a termination agreement that Synergy wanted him to sign. ALJX 3 at 73-74, 79. At no time, he testified, had he seen the LCA posted in either Synergy's Fremont office or its head office in Diamond Bar. ALJX 3 at 74. Nor, he testified, had he ever filled out time sheets while working in the Fremont office. ALJX 3 at 78-79. Mr. Balakrishnan also denied taking any vacation or sick time during the period he was employed by Synergy. ALJX 3 at 44.

At some undetermined time, an investigator in the Wage and Hour Division sent Mr. Balakrishnan a copy of Mr. Hu's summary of the allegations Mr. Balakrishnan had made during his November 1, 2001 conversation with Mr. Hu. According to the representations of the counsel for the Prosecuting Party, in March of 2003 Mr. Balakrishnan responded by preparing two documents that purport to be "Department of Labour" interview statements. One of these

statements is very similar to the statement prepared by Mr. Hu, but does not include seven sentences that were included in Mr. Hu's summary, including a sentence stating that Mr. Balakrishnan had said that he was not paid either the "rate of pay" or the "prevailing rate" stated in the LCA. RX U at 3-4. In addition, Mr. Balakrishnan changed the text of Mr. Hu's summary by deleting the claim that he had not been paid from October 6 to October 20 and by adding language asserting that he had not been paid during two additional periods: June 3 to 16, 2001 and October 20 to November 6, 2001. RX U at 3-4. Mr. Balakrishnan signed this revised document on March 25, 2003.

The second "Department of Labour" statement prepared by Mr. Balakrishnan was also signed on March 25, 2003. RX U at 1-2. It contains a chronological summary of additional information concerning Mr. Balakrishnan's employment by Synergy. RX U at 1-2. Among the allegations in this document is Mr. Balakrishnan's assertion that he believes that Mr. Trimbakkar "was also benched and not paid either." RX U at 2.

## 2. Testimony of Mr. Gnanadoss

Mr. Gnanadoss concurred with Mr. Balakrishnan's testimony that Mr. Gnanadoss recruited him to work for Synergy, but contradicted Mr. Balakrishnan's contention that he began working for Synergy on February 1, 2001. Instead, Mr. Gnanadoss asserted that Mr. Balakrishnan did not begin work until February 8, 2001. ALJX 1 at 114-15. Mr. Gnanadoss also testified that Mr. Balakrishnan had in fact received a letter offering him employment and contended that Mr. Balakrishnan picked up the letter from Synergy's Fremont office on February 7, 2001. ALJX 1 at 33-34, 114-15.

Mr. Gnanadoss also disputed Mr. Balakrishnan's testimony that he did not request any leave from Synergy. ALJX 1 at 12-14, 46-47. In fact, Mr. Gnanadoss contended that at some unspecified time Mr. Balakrishnan asked to take personal leave for approximately one month beginning in May of 2001. ALJX 1 at 12-14, 46-47. This testimony is partly corroborated by an e-mail message that Mr. Gnanadoss sent to Ms. Motupolli in Synergy's head office on May 3, 2001. ALJX 1 at 58-59, exhibit 5. In the e-mail, Mr. Gnanadoss indicated that Mr. Balakrishnan would be going on leave for about a month beginning on May 6, 2001 because he was sending his family to India and needed time "to settle relocation issues." ALJX 1 at 58-59, exhibit 5.

Nonetheless, Mr. Gnanadoss later acknowledged that even though Mr. Balakrishnan had supposedly requested to be on leave during May of 2001, during that month Mr. Balakrishnan came into Synergy's Fremont office "probably every day" for four or five hours at a time. ALJX 1 at 75-76. That testimony was corroborated by statements Ms. Rowlands made to Department of Labor investigators. In particular, one of the Wage and Hour investigators assigned to this case, Anthony Kim, testified that his notes of his telephone interview of Ms. Rowlands on April 10, 2002 indicate that she told him that in May of 2001 Mr. Balakrishnan and Mr. Trimbakkar worked in Synergy's Fremont office from 9:30 a.m. to 5:00 p.m. Tr. at 268-72, PX 11 at 1-2. Likewise, Ms. Rowlands also made similar statements to a subsequent investigator who re-interviewed her by telephone on October 17, 2002. PX 11 at 3-4, Tr. at 238 (testimony of Rudy Cortez that he interviewed Ms. Rowlands on October 17, 2002). During that interview, Ms. Rowlands recalled that Mr. Balakrishnan and Mr. Trimbakkar came into Synergy's Fremont

office on a daily basis during the month of May 2001 and would remain there from approximately 9:30 or 10:00 in the morning until 5:00 in the afternoon. PX 11.

However, both Mr. Gnanadoss and Ms. Rowlands later qualified their statements concerning their observations during May of 2001. For example, during the course of Mr. Gnanadoss's deposition testimony, he contradicted his testimony that Mr. Balakrishnan came to the office nearly every day by suggesting that during May of 2001 Mr. Balakrishnan may have come to the Fremont office only "once in a while" or even as infrequently as one day a week. ALJX 1 at 75, 76, 79. Similarly, in deposition testimony given by Ms. Rowlands on June 16, 2003 she asserted that her recollection of events occurring during May of 2001 had become "vague" and contended that she could only recall that Mr. Balakrishnan came to Synergy's Fremont office during "most" of the days during May of 2001. ALJX 2 at 10-11, 24, 26, 30. In addition, she indicated that Mr. Balakrishnan might have been in office for only a "couple of hours in the morning and a couple of hours in the afternoon." ALJX 2 at 26. She also testified that these events could have occurred during April instead of May. ALJX 2 at 28.

There are also substantial differences between the testimony of Mr. Gnanadoss and Mr. Balakrishnan concerning the termination of Mr. Balakrishnan's employment. In particular, Mr. Gnanadoss testified that Mr. Balakrishnan's employment ended on September 28, 2001, not October 29, 2001, and that it was a separation agreement that he asked Mr. Balakrishnan to sign on that date, not a request to take personal leave, as claimed by Mr. Balakrishnan. ALJX 1 at 96, 98-99, 109, exhibit 4.

Finally, Mr. Gnanadoss's testimony also contradicts Mr. Balakrishnan's claim that no LCA was posted in the Fremont office. According to Mr. Gnanadoss, a copy of the LCA applicable to Mr. Balakrishnan was in fact posted in that office around the time that Mr. Balakrishnan started to work there. ALJX 1 at 40-41.

### 3. Testimony of Ms. Motupolli

Like the testimony of Mr. Gnanadoss, Ms. Motupolli's testimony also contradicts Mr. Balakrishnan's testimony in several material respects.

First, Ms. Motupolli testified that she had personally negotiated with Mr. Balakrishnan concerning his salary and explicitly denied ever telling him that he would be paid an annual salary of \$65,000. Tr. at 321.

Second, she denied telling Mr. Balakrishnan to report to work prior to February 8, 2001 and noted that her assertion is corroborated by a February 7, 2001 letter offering Mr. Balakrishnan employment beginning on February 8, 2001. Tr. at 370, RX B.

Third, Ms. Motupolli explicitly disputed Mr. Balakrishnan's assertion that he was not terminated from Synergy's employment until the end of October of 2001. Rather, she testified, sometime in early September of 2001 Synergy gave Mr. Balakrishnan notice that he would be terminated when the Documentum project ended on September 28, 2001. Tr. at 302-03. In this regard, Ms. Motupolli acknowledged that Synergy continued to provide payroll checks to Mr. Balakrishnan after September 28, 2001, but asserted that these checks were to compensate him for prior underpayments of wages. Tr. at 326-31. It is noted, however, that the earnings

statements for the two Synergy checks issued to Mr. Balakrishnan after September 28, 2001 explicitly state that the checks were for the period between September 23, 2001 and October 6, 2001 (PX 4 at 12) and for the period between October 7, 2001 and October 20, 2001 (PX 4 at 13).

### **Employment of Mr. Trimbakkar**

Mr. Trimbakkar is a citizen of India and a graduate of Bombay University. ALJX 6 at 11. He came to the United States under an H-1B non-immigrant visa in October of 2000. ALJX 6 at 6. Although Mr. Trimbakkar's testimony is corroborated in some respects by Mr. Balakrishnan's testimony, his testimony is disputed in many respects by the testimony of Mr. Gnanadoss, Ms. Motupolli, and Ms. Rao. Summaries of this testimony and related exhibits are set forth below.

#### **1. Testimony of Mr. Trimbakkar**

During the last week of January of 2001, Mr. Trimbakkar testified, he accepted an oral offer from Mr. Gnanadoss to work as a systems analyst at Synergy for an annual salary of \$65,000. Tr. at 17-18, 21. According to Mr. Trimbakkar, during his discussion with Mr. Gnanadoss, he was told that, because of market conditions, he would not be paid for time spent working in Synergy's office. Tr. at 26-27. However, Mr. Trimbakkar testified, he was "not worried at all" because he was "sure" he would be paid for time spent working on projects for Synergy's clients. Tr. at 26. Mr. Trimbakkar denied ever receiving a letter dated February 7, 2001 in which Ms. Motupalli purportedly offered him an annual salary of \$45,000 and asked him to start work on February 8, 2001. Tr. at 22, RX H. Like Mr. Balakrishnan, Mr. Trimbakkar testified that he actually started working at Synergy's Fremont office on February 1, 2001 and began work on a project for Documentum on February 8, 2001. Tr. at 19-20.

On March 15, 2001, Mr. Trimbakkar testified, he received his first compensation from Synergy and it was in the form of an "advance loan" for \$1,500. Tr. at 24-25, PX 7. According to Mr. Trimbakkar, when he later received his first regular paycheck, he spoke to Mr. Gnanadoss about receiving less than what would be owed to someone earning \$65,000 annually and was told that the market "was slow" but that his rate of pay would definitely be increased for his next project. Tr. at 22.

On March 23, 2001, the project at Documentum concluded. Tr. at 23. At that time, according to Mr. Trimbakkar, he started "a bench period," which he defines as a period of time when he was "working for the company" but didn't "have any project." Tr. at 31. During this period, he testified, he spent eight hours each week day in Synergy's Fremont office upgrading his skills and attending to interview calls from prospective clients, but did not expect to be paid for his efforts. Tr. at 31-32, 101-03. Mr. Trimbakkar's testimony in this regard is partly corroborated by the testimony of Mr. Balakrishnan, who testified that Mr. Trimbakkar worked about eight hours a day in Synergy's Fremont office during the month of May 2001. ALJX 3 at 70. It is noted, however, that although Mr. Trimbakkar was not issued any paychecks for the period between May 4, 2001 and July 1, 2001, he was given paychecks for the period between March 25, 2001 and May 5, 2001. PX 5 at 2-4.

Around July 1, 2001, Mr. Trimbakkar testified, his “bench period” ended and Synergy assigned him to began work on a computer programming project for Trader Joe’s grocery store chain. Tr. at 35-36. According to Mr. Trimbakkar, during the bench period he had not taken any kind of leave from his job at Synergy but “somewhere in the end of July 2001” Ms. Rao had called and asked him to sign a document dated April 27, 2001 in which he purportedly requested that he be given a leave of absence from April 30 to June 30, 2001 because of “unavoidable family circumstances.” Tr. at 34-35, RX I. Mr. Trimbakkar testified that he had concerns about the date on the document, but signed it anyway. Tr. at 34-35. Mr. Trimbakkar also testified that Ms. Rao told him that under the “H-1 Act” he could not be kept on unless he was paid. Tr. at 35. Around this same time, Mr. Trimbakkar testified, he began asking Synergy to provide him the papers documenting his H-1B visa and LCA, but they were not provided to him. Tr. at 58-59. No one, he asserted, ever told him that Synergy’s attorney had mailed those papers to him. Tr. at 59-60.

On August 10, 2001, Mr. Trimbakkar testified, his project for Trader Joe’s came to an end. Tr. at 38. During the six weeks he was assigned to that project, he asserted, he had worked approximately 500 hours or the equivalent of three and one-half months of 40 hour work weeks. Tr. at 37, 41, 106-08. However, during cross-examination, Mr. Trimbakkar admitted that in a resume which he had posted on the internet, he had inaccurately claimed to have worked on the Trader Joe’s project from May of 2001 to January of 2002. Tr. at 93-96.

After August 10, 2001, Mr. Trimbakkar testified, he began reporting to Synergy’s Diamond Bar office and did “basically the same thing” he had done while working in Synergy’s Fremont office. Tr. at 38. Synergy’s earnings statements for Mr. Trimbakkar indicate that the company issued paychecks to him for both pay periods in August of 2001 and for a pay period ending on September 8, 2001, but did not issue any further paychecks to him in 2001. PX 5 at 7-9.

During the second week of October of 2001, Mr. Trimbakkar testified, he picked up a “paycheck” in Synergy’s Diamond Bar office. Tr. at 45-47. It appears that the “paycheck” that Mr. Trimbakkar picked up was a check for \$774.95 that was issued on October 12, 2001. PX 5 at 10. The earnings statement for this check indicates that all of the \$774.95 was for accrued vacation and sick pay. PX 5 at 10. According to Mr. Trimbakkar’s testimony, he was told by Ms. Motupolli that he could not have the check unless he signed a “termination agreement” that was dated September 4, 2001 and purportedly ended Mr. Trimbakkar’s employment on September 8, 2001. Tr. at 45-47. Mr. Trimbakkar asserts that he signed the termination agreement because he wanted his paycheck and because he was told that Synergy would not cancel his H-1B visa. Tr. at 47-48. Even after signing the termination agreement, Mr. Trimbakkar testified, he continued working in Synergy’s Diamond Bar office. Tr. at 42, 46-48.

Around the end of October of 2001, Mr. Trimbakkar asserted, he was told to take a “vacation” and come back in January. Tr. at 48. As a result, Mr. Trimbakkar testified, he continued “under the impression” that he was still a Synergy employee. Tr. at 48.

On January 2, 2002, Mr. Trimbakkar testified, he reported to Synergy’s Fremont office, but discovered that “most of the time it was closed.” Tr. at 48.

In February, 2002, Mr. Trimbakkar asserted, he found a project and went to Mr. Gnanadoss to ask that he be put back on the payroll, but Mr. Gnanadoss told him that his H-1B visa had been “deactivated.” Tr. at 49-50, 109-10. As a result, Mr. Trimbakkar testified, he found another H-1B employer and began the process of applying for a new H-1B visa. Tr. at 50. As part of this process, he recalled, in April of 2002 he sent Ms. Motupolli an e-mail requesting that Synergy provide him a letter stating that he had been on vacation from “mid-sep till feb.” Tr. at 50-52, RX M at 21. The same e-mail also requested a check in payment for 28 hours of vacation pay and “an experience certificate” concerning the work he performed for Synergy. On cross examination, Mr. Trimbakkar admitted that although he was not on vacation from the middle of September of 2001 to February 2002, he asked Synergy for such a letter so that he could use it to renew his H-1B visa. Tr. at 100-101, 111-12, RX M. Later, however, he asserted that he was in fact on vacation during that period. Tr. at 114-15.

In the months after receiving Mr. Trimbakkar’s e-mail, Synergy provided a check to Mr. Trimbakkar, but he sent back further e-mails indicating that he had not cashed it because he felt more was owed. Tr. at 53-58, RX M. Mr. Trimbakkar also continued to press Synergy to provide him his “latest paystub” so that it could be used to support his application for renewal of his H-1B visa. Tr. at 53-58, RX M. Eventually Mr. Trimbakkar began to threaten to “take the next step” and do the “dirty job” if Synergy did not provide the materials he requested. Tr. at 53-58, RX M. According to Mr. Trimbakkar, his threat to do the “dirty job” was a reference to making a complaint to the INS.

Mr. Trimbakkar also testified concerning medical and dental insurance coverage that he received as an employee of Synergy. In this regard, he asserted that he had filled out Blue Cross group health insurance forms on his first day of work at Synergy, but never received an insurance card. Tr. at 61-62. In September of 2001, he testified, he needed to have a wisdom tooth removed and was told by a Blue Cross representative that his coverage was “not active.” Tr. at 62-64. As a result, he testified, he reported the situation to Synergy and was told by the company’s insurance agent, Peter Jadav, that his insurance would go into effect on October 1, 2001. Tr. at 63. In October, Mr. Trimbakkar testified, he had the necessary dental work and Blue Cross paid the dentist. Tr. at 63. Nonetheless, on November 2, 2001, Blue Cross sent a letter to Mr. Trimbakkar which informed him that his insurance coverage had been terminated on October 1, 2001 as a result of a “termination of employment or reduction of work hours.” RX O. The letter also indicated that under the provisions of a California statute Mr. Trimbakkar might be entitled to continue his insurance at this own expense. RX O. During the trial, however, Mr. Trimbakkar testified that he had never received this letter and had never resided at or used the address in Diamond Bar to which the letter had been sent. Tr. at 64-65. In January 2003, Mr. Trimbakkar asked Blue Cross to provide him a certificate showing the period during which Synergy provided him with group health insurance. Tr. at 65-67. In response, Blue Cross sent him a document indicating that he had been insured from October 1, 2001 until December 1, 2001. Tr. at 67, PX 8.

Finally, Mr. Trimbakkar testified that he does not recall when he first contacted the DOL concerning Synergy. Tr. at 99. However, he then said he believes that January 2002 was the approximate date. Tr. at 99. The only document in the record which concerns Mr. Trimbakkar contacts with the DOL is a summary of an interview of Mr. Trimbakkar that Mr. Cortez prepared on December 19, 2002. RX V. This document indicates that during the interview Mr.

Trimbakkar had reported that he had worked in Synergy's Fremont office from March 24, 2001 to June 30, 2001 but had not been paid during that time period. RX V. In addition, it reports that Mr. Trimbakkar alleged that Synergy had never given him a copy of its LCA and that he had never seen it posted anywhere. RX V. However, the document also indicates that Mr. Trimbakkar said that he had worked from August 11, 2001 to October 30, 2001 in Synergy's "Los Angeles office" and had been paid during that time. RX V. This document was signed by Mr. Cortez, but not by Mr. Trimbakkar.

## 2. Testimony of Mr. Gnanadoss

Mr. Trimbakkar's testimony concerning the beginning of his employment by Synergy is disputed in several respects by Mr. Gnanadoss. In particular, Mr. Gnanadoss denied ever telling Mr. Trimbakkar that he would only be paid for time spent working for a client and would not be paid for time spent in Synergy's office. ALJX 1 at 116-20. Mr. Gnanadoss also insisted that he lacked the authority to adopt or implement such a policy. ALJX 1 at 116-20. Mr. Gnanadoss further testified that on February 7, 2001 Mr. Trimbakkar personally picked up Synergy's written offer of employment at Synergy's Fremont office. ALJX 1 at 115. In addition, Mr. Gnanadoss testified that Mr. Trimbakkar did not engage in any training at Synergy's Fremont office during the first week of February of 2001 and asserted that Mr. Trimbakkar did not start working for Synergy until February 8, 2001. ALJX 1 at 111-12.

Mr. Gnanadoss also contradicted Mr. Trimbakkar's claim that he did not take any leave during the period between the end of the Documentum project and the beginning of the project for Trader Joe's. In particular, Mr. Gnanadoss testified that around the end of April of 2001 Mr. Trimbakkar asked him about taking a leave of absence and was told that he should contact Synergy's head office about the request. ALJX 1 at 123. However, Mr. Gnanadoss acknowledged that Mr. Trimbakkar appeared in Synergy's Fremont office two or times a week during the month of May of 2001 to check his e-mail and would remain there for one to four hours at a time. ALJX 1 at 126-27. After May, Mr. Gnanadoss asserted, he never saw Mr. Trimbakkar in the Fremont office. ALJX 1 at 127-29.

In April of 2002, Mr. Gnanadoss testified, Mr. Trimbakkar called him on the telephone to ask about his "vacation balance" and to request an "experience letter for his future needs." ALJX 1 at 129. After speaking with Mr. Trimbakkar, Mr. Gnanadoss wrote a note to Ms. Motupolli in which he relayed Mr. Trimbakkar's requests. ALJX 1 at 130. The note also reported that Mr. Trimbakkar had said that Mr. Balakrishnan had called him and encouraged him "to talk against Synergy Systems if he received any call from Department of Labor." ALJX 1 at exhibit 3.

## 3. Testimony of Ms. Motupolli

During her testimony, Ms. Motupolli directly disputed many of Mr. Trimbakkar's claims concerning the beginning and the conclusion of Mr. Trimbakkar's employment by Synergy. In particular, she specifically denied ever telling Mr. Trimbakkar to begin work before February 7, 2001. Tr. at 371. This assertion is corroborated by the fact that the February 7, 2001 letter offering to hire Mr. Trimbakkar specified that his employment was to begin on February 8, 2001. RX H. Likewise, Ms. Motupolli asserted that she had personally negotiated with Mr.

Trimbakkar concerning his salary and explicitly testified that she never told him that he would be paid an annual salary of \$65,000. Tr. at 322. Instead, she testified, she offered him an annual salary of \$45,000, as was specified in the February 7, 2001 written offer of employment. Tr. at 322.

Ms. Motupolli's testimony concerning the termination of Mr. Trimbakkar's employment also differs substantially from Mr. Trimbakkar's account of that event. According to Ms. Motupolli, the decision to terminate Mr. Trimbakkar was made in the beginning of September of 2001 and was due to the fact that there was no work for him as the result of a "radical downturn" in the information technology industry. Tr. at 294-95, 365-66. She also testified that she thinks Mr. Trimbakkar was given about a week's notice of his termination. Tr. at 295. As support for her contention that Mr. Trimbakkar had been terminated in early September, Ms. Motupolli referred to payroll records prepared by Wells Fargo Bank in December of 2001 which show that Mr. Trimbakkar's employment at Synergy terminated on September 8, 2001. Tr. at 281-82, RX N at 30. Ms. Motupolli also challenged Mr. Trimbakkar's testimony that he continued working in the Diamond Bar office until the end of October of 2001. According to Ms. Motupolli, she was in that office throughout September and October of 2001 and during that period Mr. Trimbakkar came to office on only a few occasions and only for very brief periods of time. Tr. at 304-05.

Ms. Motupolli also disputed the notion that the issuance of payroll checks to Mr. Trimbakkar after September 8, 2001 indicated that his employment had continued beyond that date. In this regard, she acknowledged that Mr. Trimbakkar had been given payroll checks that had been issued on October 12, 2001 and May 20, 2002, but contended that the check issued on October 20, 2001 was for accrued vacation time and implied that the check issued in May of 2002 was for wages that had inadvertently not been paid for Mr. Trimbakkar's work during the first part of February 2001. Tr. at 334-36, 345-46. She also asserted that the issuance of regular pay checks to Mr. Trimbakkar ceased after September 8, 2001. Tr. at 295.

Ms. Motupolli supported her contention that Mr. Trimbakkar had been terminated in September of 2001 by testifying that she thinks Synergy notified Blue Cross in September of 2001 that Mr. Trimbakkar had been terminated. Tr. at 318, 355. Ms. Motupolli's testimony concerning Mr. Trimbakkar's insurance coverage is partly corroborated by a declaration of Mr. Jadav. According to Mr. Jadav's declaration, during mid-September of 2001, he had Mr. Trimbakkar complete a new insurance application and sent the application to Blue Cross. ALJX 4. Thereafter, Mr. Jadav declared, he called Blue Cross and learned that Mr. Trimbakkar group insurance coverage would go into effect on October 1, 2001. ALJX 4. However, he added, one or two days later was told by Ms. Rao that Mr. Trimbakkar no longer worked for Synergy. ALJX 4. As a result, Mr. Jadav declared, he called Blue Cross the same day and told "someone" to cancel Mr. Trimbakkar's coverage. ALJX 4. Mr. Jadav also represented that on October 31, 2001 he received a form from Ms. Rao instructing Blue Cross to delete a group of individuals, including Mr. Trimbakkar and Mr. Balakrishnan, from Synergy's group insurance coverage. ALJX 4. The form had been signed by Ms. Rao on October 30, 2001. ALJX 4. The form listed September 8, 2001 as Mr. Trimbakkar's termination date and September 28, 2001 as the termination date for Mr. Balakrishnan. ALJX 4.

Mr. Jadav's declaration is partly corroborated by the deposition testimony of Blue Cross group insurance specialist Dana Gonzalez. According to Ms. Gonzales, Blue Cross records indicate that it received Mr. Trimbakkar's new application form from Mr. Jadav on September 28, 2001 and later received inquiries of an unspecified nature concerning Mr. Trimbakkar's coverage on October 2, 4, and 19, 2001. ALJX 5 at 50, 61. She also testified that Blue Cross processed a cancellation of Mr. Trimbakkar's coverage on November 1, 2001 and made the cancellation retroactive to October 1, 2001. ALJX 5 at 14, 27-28, 37. In addition, she concluded that the Blue Cross certificate showing that Mr. Trimbakkar had been insured from October 1 to December 1, 2001 was inaccurate and issued in error. ALJX 5 at 56-58. However, Ms. Gonzalez further testified that a phone call would not have been sufficient to cancel Mr. Trimbakkar's insurance coverage and that the form signed by Ms. Rao on October 30, 2001 is the only document it has showing that Synergy terminated Mr. Trimbakkar's employment. ALJX 5 at 63-64. Ms. Gonzalez also indicated that an insurance application form Mr. Trimbakkar submitted in April of 2001 was incomplete and would not have been accepted by Blue Cross. ALJX 5 at 54-55.

#### 4. Testimony of Ms. Rao

During her testimony, Ms. Rao disputed two of Mr. Trimbakkar's assertions.

First, Ms. Rao testified that sometime in April of 2001 Mr. Trimbakkar called her and told her he wanted to take some leave. Tr. at 125. She added that she told Mr. Trimbakkar to put his request in writing, but acknowledged that she had not seen the document that purports to be Mr. Trimbakkar's written request for leave (RX I) until "a couple of months" before the trial. Tr. at 125-26.

Second, Ms. Rao directly contradicted Mr. Trimbakkar's testimony that he did not sign the purported separation agreement until the second week of October in 2001. According to Ms. Rao, she gave the agreement to Mr. Trimbakkar on September 4, 2001 and he returned the signed document to her on September 14, 2001. Tr. at 130-132.

### ANALYSIS

Under the INA and implementing regulations, a domestic employer may hire foreign nationals engaged in "specialty occupations" to work in the United States for prescribed periods of time. 8 U.S.C. §1101(a)(15)(H)(i)(b); 20 C.F.R. §655.700. These non-immigrant workers are issued H-1B visas by the Department of State upon approval by the INS. 20 C.F.R. § 655.705(b). An employer seeking to hire an alien in a specialty occupation on an H-1B visa must obtain certification from the United States Department of Labor ("DOL") by filing an Labor Condition Application (LCA) before the worker is given an H-1B visa. 8 U.S.C. § 1182(n). An LCA filed by an employer must set forth, *inter alia*, the wage rate and working conditions for the H-1B employee. 8 U.S.C. §1182(n)(1)(D); 20 C.F.R. §§655.731 and 655.732. Upon certification of the LCA by the DOL, the employer is required to pay the wage rates and provide the working conditions set forth in the LCA. 8 U.S.C. §1182(n)(2); 20 C.F.R. §655.731(c)(7). Moreover, the employer is required to pay an H-1B worker the prescribed wage rate even during periods when the worker is in a "nonproductive status" because of a lack of assigned work. 8 U.S.C. §1182(n)(2)(C)(vii); 20 C.F.R. §655.731(c)(7)(i). However, wages at

the prescribed rate need not be paid to an H-1B worker when the worker is away from work at his or her own voluntary request (i.e., when the worker is taking a voluntary leave of absence) or when the worker is incapacitated (i.e., when the worker is hospitalized or otherwise medically precluded from working). 8 U.S.C. §1182(n)(2)(C)(vii) (IV); 20 C.F.R. §655.731(c)(7)(i). Likewise, wage payments are not required after there has been a *bona fide* termination of the employment relationship. 20 C.F.R. §655.731(c)(7)(i). If an employer willfully fails to pay the wages prescribed by the LCA, a civil penalty of as much as \$5,000 can be assessed per violation. 8 U.S.C. §1182(n)(2)(C)(ii); 20 C.F.R. §655.810(b)(2)(i). In addition, for at least two years such an employer will be disqualified from seeking approval of petitions under the provisions of section 204 and 214 of the INA. 8 U.S.C. §1182(n)(2)(C)(vii); 20 C.F.R. §655.810(d)(2). A willful violator is defined at 20 C.F.R. §655.736(f) and §655.805(c) as being an employer that knowingly or through reckless disregard of the law engages in conduct violative of §212(n)(1)(A)(i) or (ii) of the INA (8 U.S.C. §1182(n)(1)(A)). Under the terms of 8 U.S.C. §1182(n)(2)(C)(vii) a failure to pay an H-1B employee who is in “nonproductive status” can constitute a violation of 8 U.S.C. §1182(n)(1)(A). In determining the amount of any civil money penalties, consideration must be given to the type of violation committed and to the factors set forth at 20 C.F.R. §655.810(c)(1).

In this case, the parties have disputes concerning the following factual issues: (1) whether jurisdiction over this matter is precluded by the DOL’s failure to fully comply with the requirements of 8 U.S.C. §1182(n)(2)(A) and (B), (2) the amount of unpaid wages, if any, owed to Mr. Balakrishnan and Mr. Trimbakkar, (3) whether any failure to pay the prescribed wages to Mr. Balakrishnan or Mr. Trimbakkar was willful, (4) the appropriateness of the \$5,000 civil penalty sought by the Administrator, (5) whether the LCA for Mr. Balakrishnan and Mr. Trimbakkar was made available to employees for examination in the manner required by 20 C.F.R. §655.760(a), and (6) whether copies of the LCA for Mr. Balakrishnan and Mr. Trimbakkar were provided to them as required by the provisions of 20 C.F.R. §655.734(a)(3). Findings concerning each of these issues are set forth below.

#### 1. Jurisdiction

Under the provisions 8 U.S.C. §1182(n)(2)(A), no investigation or hearing concerning an employer’s alleged failure to comply with the provisions of an LCA can be conducted unless a complaint is filed within 12 months of the alleged failure by an “aggrieved person” or organization. If such a complaint is filed within that time period, the provisions of 8 U.S.C. §1182(n)(2)(B) direct the Secretary of Labor to determine within 30 days whether the complaint has a reasonable basis. In addition, in those cases in which the Secretary determines that a complaint has a reasonable basis, the statute specifies that interested parties must be given an opportunity for an evidentiary hearing within 60 days of such determination.

According to the Respondent’s post-trial briefs, the absence of any evidence that Mr. Trimbakkar filed a complaint with the DOL within 12 months after the termination of his employment at Synergy warrants a finding that there is no jurisdictional basis for considering any alleged violations concerning Mr. Trimbakkar. Likewise, the Respondent further argues that jurisdiction is lacking over any of the remaining aspects of the case because the Secretary failed to make a “reasonable basis” determination within the prescribed 30 days and also failed to offer the parties a hearing within the next 60 days.

The Respondent's arguments are disputed by the Prosecuting Party. In particular, the Prosecuting Party asserts that because Mr. Balakrishnan's complaint was received within 12 months after the alleged violations, the subsection 1182(n)(2)(A) jurisdictional bar does not preclude consideration of alleged violations involving other aggrieved persons, including Mr. Trimbakkar. Similarly, the Prosecuting Party contends that because, subsection 1182(n)(2)(B) does not specify any consequences for a failing to determine if a complaint has a reasonable basis within 30 days or for failing to commence a hearing within 60 days, those time periods are merely directory, not jurisdictional.

After review of the relevant statutes, regulations and precedents, it has been concluded that there is no merit to either of the Respondent's jurisdictional arguments.<sup>3</sup>

As already noted, the Respondent's first jurisdictional argument is the contention that even though Mr. Balakrishnan filed a complaint that was timely under the provisions of 8 U.S.C. §1182(n)(2)(A), Mr. Trimbakkar's apparent failure to make a complaint to the DOL within 12 months after any of the alleged violations means that there is no jurisdiction over any of the alleged violations involving Mr. Trimbakkar.<sup>4</sup> Neither the Respondent nor the Prosecuting Party has cited any appellate decisions that directly address this contention, but the Prosecuting Party has pointed out that there is at least one Administrative Law Judge decision that used the date of a complaint by one aggrieved person for purposes of determining the applicability of 8 U.S.C. §1182(n)(2)(A) to alleged violations involving another person. *See Administrator v. Kutty*, 2001-LHC-10 at 55 (October 9, 2002). The pertinent language from 8 U.S.C. §1182(n)(2)(A) is as follows:

Subject to paragraph (5)(A), the Secretary [of Labor] shall 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 paragraph (1) 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). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

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<sup>3</sup> In this regard, it is noted that the Department of Labor's own regulations concerning LCA enforcement describe the 12-month period set forth in 8 U.S.C. §1182(n)(2)(A) as being "jurisdictional." 20 C.F.R. §655.806(a)(5). It is further noted that a litigant generally may raise issues concerning a court's jurisdiction at any time in the same civil action. *See Mansfield, C & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884).

<sup>4</sup> As previously explained, Mr. Trimbakkar is unsure when he first contacted the DOL, but thinks that this contact may have occurred in January of 2002. However, the fact that the DOL did not produce any documents recording any contacts with Mr. Trimbakkar prior to December 19, 2002 indicates that it is more likely than not that Mr. Trimbakkar's first contact with the DOL did not occur until December of 2002.

Presumably, the Respondent's argument is based on the assumption that the word "complaint" in the foregoing passage must be narrowly construed so that it applies only to the specific grievances made by the person submitting the complaint. Conversely, the Prosecuting Party is apparently defining the term "complaint" very broadly so that any allegation by any aggrieved person or organization would provide the Secretary with broad jurisdiction to investigate and conduct hearings concerning any and all possible misrepresentations or compliance failures that may be related to a particular LCA.

The Department of Labor regulations concerning LCA enforcement do not define the term "complaint" and there are arguably many different ways to interpret the term. However, it is concluded that, as used in 8 U.S.C. §1182(n), the word "complaint" should be interpreted as encompassing not only the individual grievances of the aggrieved person making the complaint but also all other similar violations involving the same LCA, even if those other violations involve other aggrieved persons who were not identified by the person making the complaint. Hence, Mr. Balakrishnan's November 2001 complaint would provide a sufficient basis for exercising jurisdiction over both the alleged violations involving Mr. Balakrishnan and the alleged violations involving Mr. Trimbakkar.

Moreover, even if the term "complaint" were given a very narrow interpretation, it appears that there would still be jurisdiction over the alleged violations concerning Mr. Trimbakkar. This conclusion follows from the fact that there is circumstantial evidence indicating that Mr. Balakrishnan's complaint of November 1, 2001 concerned both his own employment and that of Mr. Trimbakkar. This inference is based on the fact that Mr. Kim's notes of his April 2002 interview of Ms. Rowlands indicate that Mr. Kim was seeking information concerning both Mr. Balakrishnan and Mr. Trimbakkar. PX 11 at 4 (notes referring to "either Ramesh or Dinges"), Tr. at 268-72. In this regard, it is recognized that it could be contended that because Mr. Balakrishnan was not the person "aggrieved" by the Respondent's alleged failure to properly pay Mr. Trimbakkar, the information provided by Mr. Balakrishnan did not satisfy the statutory requirement that complaints be made by an "aggrieved person." However, such an argument ignores the fact that any alleged failure to pay an employee the full amounts required by an LCA could cause an employer to use the underpaid employee more frequently than other employees and thereby reduce the amount of work available to those other employees.

As previously noted, the Respondent's second jurisdictional argument is the contention that jurisdiction has been lost because of the Secretary's failure to act within the various time frames set forth in 8 U.S.C. §1182(n)(2)(B). Unquestionably, the Wage and Hour Division's investigation in this case was slow, shallow, and sporadic. However, review of the relevant case law indicates that there is no merit to the Respondent's contention that the failure to comply with the statutory deadlines means that jurisdiction has been lost. Indeed, as pointed out by the Prosecuting Party, the relevant precedents establish that the time periods set forth in subsection 1182(n)(2)(B) are only directory, not jurisdictional. *See Brock v. Pierce County*, 476 U.S. 253, 259 (1986) (noting that government agencies do not lose jurisdiction for failure to comply with statutory time limits unless the statute "both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision"). Hence, the Secretary's failure in this case to comply with the time limits in 8 U.S.C.

§1182(n)(2)(B) does not preclude the Secretary from exercising jurisdiction over this matter. *See also Administrator v. Alden Management Services, Inc.*, ARB Nos. 00-20 and 00-21, ALJ No. 1996-ARN-3, slip op. at 5 (ARB Aug. 30, 2002).

## 2. Amount of Any Unpaid Wages Owed to Mr. Trimbakkar and Mr. Balakrishnan

Synergy's payroll records indicate that Mr. Balakrishnan and Mr. Trimbakkar were not paid for various periods of time in February, March, May, June, September, and October of 2001. PX 3. As a result, the Administrator's April 14, 2003 determination concluded that the Respondent had underpaid Mr. Balakrishnan by \$6,304.94 and Mr. Trimbakkar by \$17,150.87. PX 2. During the trial, however, the Prosecuting Party reported that it had incorrectly calculated the amounts of the unpaid wages and that, in fact, Mr. Balakrishnan is owed \$1,730.77 more than originally claimed (i.e., \$8,035) and Mr. Trimbakkar is owed \$1,730.77 less than previously alleged (i.e., \$15,420.10). Tr. at 214-17. Although the Respondent challenges the Administrator's determinations concerning the periods of time that Mr. Balakrishnan and Mr. Trimbakkar were in fact working for Synergy, it does not challenge the Administrator's arithmetic in calculating the amounts that are allegedly owed to Mr. Balakrishnan and Mr. Trimbakkar.

The Prosecuting Party's evidence of the alleged underpayments principally consists of testimony in which Mr. Balakrishnan and Mr. Trimbakkar asserted that they worked for Synergy from the first of February 2001 until the end of October 2001 without any breaks except weekends and holidays. As previously explained, much of that testimony was directly contradicted by the testimony of Synergy's management employees. Moreover, there are a variety of additional reasons for questioning the accuracy of the testimony of Mr. Balakrishnan and Mr. Trimbakkar. For example, the testimony of Mr. Balakrishnan and Mr. Trimbakkar is uncorroborated by any documentary evidence (e.g., time sheets) showing that either of these individuals actually worked in Synergy's offices during any of the periods for which they were not paid. Likewise, their testimony is inconsistent with the fact that the Respondent has produced documents purportedly showing that both Mr. Balakrishnan and Mr. Trimbakkar requested leaves of absence in late April or early May of 2001. The credibility of Mr. Balakrishnan and Mr. Trimbakkar is also drawn into question by their assertions that Synergy offered each of them annual salaries of \$65,000. In this regard, it is noted that it seems highly unlikely that Synergy would have seen any need to offer these individuals salaries that exceeded the prevailing wage for similarly qualified workers by more than \$20,000 a year. In addition, the record contains letters to Mr. Balakrishnan and Mr. Trimbakkar offering them annual salaries of only \$45,000 and a copy a LCA that indicates that they would be paid as little as \$44,000 a year. Although Mr. Balakrishnan and Mr. Trimbakkar claim that they did not see any of these documents until after their employment ended, these assertions are inconsistent with the representations of other witnesses, including Ms. Vibhakar.

It is further noted that Mr. Trimbakkar's claim that he continued working for Synergy until the end of October of 2001 is inconsistent with the fact that he signed a termination agreement indicating that his employment ended on September 8, 2001. Although Mr. Trimbakkar contends that the termination agreement was backdated, Synergy's payroll records show that Mr. Trimbakkar was in fact taken off of Synergy's payroll on September 8, 2001, just as the termination agreement specifies. In addition, on cross-examination Mr. Trimbakkar

admitted that he had misrepresented his job experience on his resume and had requested documents from Synergy that were apparently intended to deceive the INS concerning the length of his employment by Synergy. It also appears that Mr. Trimbakkar's testimony was inaccurate insofar as he asserted that he had completed a health insurance application on his first day of work. Tr. at 61-62 (Mr. Trimbakkar's testimony he had completed an insurance application on his first day of work for Synergy), ALJX 4, Attachment A (insurance application signed April 19, 2001).

On the other hand, there are also substantial reasons for questioning the accuracy of the testimony in which Mr. Gnanadoss, Ms. Motupolli, and Ms. Rao alleged that during the periods when Mr. Balakrishnan and Mr. Trimbakkar were not paid, they were either on leaves of absence or for other reasons not on Synergy's premises. For example, the assertion that Mr. Balakrishnan took a voluntary leave of absence in May of 2001 merely because his family had returned to India does not ring true. Moreover, the reason given for Mr. Trimbakkar's alleged leave of absence ("unavoidable family circumstances") is so vague that it is meaningless. Even more significantly, Ms. Rowland's statements to the Department of Labor investigators strongly suggest that both Mr. Balakrishnan and Mr. Trimbakkar routinely reported to Synergy's Fremont office during their purported leaves of absence. Although Mr. Gnanadoss has testified that Mr. Balakrishnan and Mr. Trimbakkar were merely engaged in personal pursuits during that period, his testimony on this subject was so evasive and inconsistent that it is not credible. In addition, that testimony is inconsistent with the evidence indicating that Mr. Balakrishnan spoke with Mr. Watson during May of 2001 about having Synergy provide computer programming services to Mr. Watson's company. Likewise, Mr. Gnanadoss's testimony that Mr. Balakrishnan was terminated in September of 2001 is directly contradicted by Synergy payroll records showing that Mr. Balakrishnan continued to be paid until the end of October of 2001.

In addition, Synergy has failed to provide convincing explanations for conduct that does not appear to be consistent with the various rules governing the employment of H-1B visa holders. For example, although the evidence indisputably establishes that Mr. Balakrishnan and Mr. Trimbakkar had begun working a project for a Synergy client on February 8, 2001, none of Synergy's witnesses has explained why the H-1B petitions Synergy filed on behalf of Mr. Balakrishnan and Mr. Trimbakkar represented that their employment would not commence until March 15, 2001. Similarly, there has been no reasonable explanation for the fact that Synergy did not promptly pay Mr. Balakrishnan and Mr. Trimbakkar for their work during the period between February 8, 2001 and March 15, 2001. Although Ms. Motupolli has suggested that payments for that period were made sometime after September of 2001, the earnings statements for the period after September 2001 contradict that hypothesis. Moreover, there has been no credible explanation for the long delay in making such payments. It is also odd that Synergy has failed to produce any records that would show when it notified the INS that the employment of Mr. Balakrishnan and Mr. Trimbakkar had been terminated. Tr. at 349-50 (Ms. Motupolli's testimony that she believes she notified the INS of Mr. Balakrishnan's termination in late October of 2001 and of Mr. Trimbakkar's termination in late September or early October of 2001, but does not think or cannot recall if Synergy received receipts from the INS).

Because of the many doubts about the accuracy of the testimony of all of the foregoing witnesses, it has been concluded that, although all of these witnesses did testify truthfully on

some aspects of Synergy's employment of Mr. Balakrishnan and Mr. Trimbakkar, none of these witnesses told the full truth and, in some cases, their testimony was knowingly false. For this reason, it has been necessary to discount much of the testimony and to give greater weight to the inferences that can be reasonably drawn from the less questionable documentary evidence. This documentary evidence includes the LCA, the H-1B petitions, the earnings statements issued to Mr. Balakrishnan and Mr. Trimbakkar, and the records produced by Blue Cross.

After so considering evidence, it appears to be more likely than not that Synergy had an understanding with Mr. Balakrishnan and Mr. Trimbakkar that they would be paid for all work done on fee-producing projects and for the first month of any period in which they were not working on such a project, but that they would not receive any more pay until they were assigned to new fee-producing projects. This conclusion is illustrated by the fact that payroll records show that both Mr. Balakrishnan and Mr. Trimbakkar were paid for approximately the first month after the conclusion of their work on the Documentum project, but were not paid again until each of them began working on a new project. PX 3. Likewise, Mr. Trimbakkar's pay stopped approximately one month after the conclusion of his project for Trader Joe's concluded on August 10, 2001, and the salary payments to Mr. Balakrishnan ended one month after he completed his second project for Documentum on September 28, 2001. PX 3. It also appears that, as part of the arrangement, Mr. Balakrishnan and Mr. Trimbakkar agreed that during periods when they were not working on a project they would work in Synergy's offices in an attempt to improve their computer skills and find new fee-paying projects to which Synergy could assign them. This conclusion is demonstrated by the fact that the weight of the evidence indicates that both individuals routinely reported to work in Synergy's Fremont office during all of April and May of 2001, even though they were paid only for the month of April. Likewise, it appears that, in furtherance of this arrangement, Mr. Balakrishnan and Mr. Trimbakkar may have also agreed that after the end of the first month of being off a fee-producing project, they would ask for "leaves of absence" to explain the temporary suspensions of their paychecks. This is illustrated by the fact that the record contains a document in which Mr. Trimbakkar purportedly requested permission to take a leave of absence during the months of May and June, even though the evidence indicates that Mr. Trimbakkar worked in Synergy's Fremont office during the entire month of May. Likewise, the evidence includes a copy of an e-mail purportedly documenting Mr. Balakrishnan's request for a leave of absence during the month of May even though he reported daily to Synergy's Fremont office during that month. The conclusion that Mr. Balakrishnan and Mr. Trimbakkar consented to take phony leaves of absence is also consistent with the fact that Mr. Trimbakkar was willing to sign his bogus leave request and the fact that there is no evidence indicating that either Mr. Balakrishnan or Mr. Trimbakkar made any contemporaneous complaints to Synergy or anyone else about not receiving any paychecks for parts of May and June of 2001. It is also noted that the practice of paying Mr. Balakrishnan and Mr. Trimbakkar for the first month following the conclusion of their work on a project for a Synergy client may in some way be related to the fact that neither Mr. Balakrishnan nor Mr. Trimbakkar made any contemporaneous complaints about Synergy's failure to promptly pay them for the work they performed during February and early March of 2001.

The preponderance of the credible evidence also indicates that it is more likely than not that Mr. Balakrishnan and Mr. Trimbakkar told the truth when they testified that they worked for Synergy on a continuous basis from February 1, 2001 until the end of October of 2001. This

finding is primarily supported by the fact that the weight of the evidence indicates that neither Mr. Balakrishnan nor Mr. Trimbakkar actually took a leave of absence during May and June of 2001 and by the fact that Mr. Balakrishnan continued to be paid until October 20, 2001. However, the evidence also indicates that Mr. Balakrishnan and Mr. Trimbakkar did not testify truthfully when they claimed that they were offered annual salaries of \$65,000 per year. This conclusion is supported by the written employment offers specifying \$45,000 annual salaries and by the fact that the payroll records show that the paychecks checks received by Mr. Balakrishnan and Mr. Trimbakkar reflect earnings of approximately \$45,000 per year. Likewise, the weight of the evidence suggests that although Mr. Balakrishnan did in fact report to Synergy's offices throughout the month of October of 2001 and make unsuccessful efforts to help Synergy find some new projects, he had been given notice at the end of September of 2001 that he would be terminated from Synergy's employment if he did not obtain some new projects by the end of October. This finding is partly supported by the fact that Mr. Balakrishnan continued to receive paychecks from Synergy until the end of October of 2001. Similarly, it appears that Mr. Trimbakkar had been given notice of his termination in early September of 2001, but allowed to continue to report to Synergy's offices until the end of October of 2001 so that he could attempt to help Synergy find a new project that would allow him to be reinstated to Synergy's payroll. It appears that this arrangement continued until Synergy told Mr. Trimbakkar to take a "vacation" at the end of October of 2001.

Accordingly, it has been concluded that Synergy owes Mr. Balakrishnan and Mr. Trimbakkar the full amounts alleged by the Administrator but is entitled to a credit of \$500 for each of these employees to account for \$500 portions of the \$1,500 "advance loans" that were not deducted from Mr. Balakrishnan's and Mr. Trimbakkar's first paychecks. As previously explained, Mr. Balakrishnan was underpaid by \$8,035.00 and Mr. Trimbakkar was underpaid \$15,420.10. Hence, Synergy now owes \$7,535.00 to Mr. Balakrishnan and \$14,920.10 to Mr. Trimbakkar.

### 3. Willfulness of Any Failure to Pay Wages during Non-Productive Periods

As previously noted, for purposes of enforcing the INA's H-1B provisions, a willful violator is defined at 20 C.F.R. §655.736(f) and §655.805(c) as an employer that knowingly or through reckless disregard of the law engages in conduct violative of §212(n)(1)(A)(i) or (ii) of the INA (8 U.S.C. §1182 (n)(1)(A)). See also *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988), and *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). In this case, the weight of the evidence indicates that Synergy's managers did not pay Mr. Balakrishnan or Mr. Trimbakkar during periods in May and June of 2001 when they were not assigned to fee-paying projects and that, as a result, Synergy violated the provisions of the INA that require employers to continue to pay H-1B employees during such so-called "non-productive" periods unless the employees are on *bona fide* leaves of absence. The INA expressly provides that such conduct constitutes a violation of 8 U.S.C. §1182 (n)(1)(A). See 8 U.S.C. §1182(n)(2)(C)(vii). Moreover, the evidence indicates that Synergy's violation of this provision was in fact willful. The strongest proof of this conclusion is the evidence showing that Synergy's managers generated and retained written records falsely suggesting that Mr. Balakrishnan and Mr. Trimbakkar were on leaves of absence during periods when these individuals were in fact working in Synergy's Fremont office.

#### 4. Appropriateness of \$5,000 Civil Penalty

Under 8 U.S.C. §1182(n)(2)(C) a civil penalty of as much as \$5,000 can be assessed against an employer that willfully violates any of the conditions prescribed by the provisions of 8 U.S.C. §1182(n)(1). In this case, the Prosecuting Party apparently contends that because Synergy underpaid two employees during “non-productive” periods, there were two violations and it would therefore be possible to assess civil penalties of as much as \$10,000. However, the Prosecuting Party asks only for a civil penalty of \$5,000.

As previously noted, the amount of a civil penalty assessment should be based on the type of violation and on the factors set forth at 20 C.F.R. §655.810(c)(1). That provision mandates consideration of all other “relevant factors,” but specifies that at least the following seven circumstances must be considered:

- (1) Previous history of violation, or violations, by the employer under the INA and this subpart I or subpart H of this part;
- (2) The number of workers affected by the violation or violations;
- (3) The gravity of the violation or violations;
- (4) Efforts made by the employer in good faith to comply with the provisions of 8 U.S.C. 1182(n) and this [*sic*] subparts H and I of this part;
- (5) The employer's explanation of the violation or violations;
- (6) The employer's commitment to future compliance; and
- (7) The extent to which the employer achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties.

After considering all of the foregoing factors, it has been concluded that the \$5,000 penalty recommended by the Prosecuting Party is the appropriate civil penalty. In this regard, it is noted that the first two factors favor a lesser civil penalty, but that factors three to five and seven favor an increased penalty.

#### 5. Making the Labor Condition Application Available to Employees as required by 20 C.F.R. §655.760(a)

The Administrator does not seek the imposition of any civil penalty against Synergy for violating the provisions of 20 C.F.R. §655.760. However, the Administrator does contend that Synergy violated this provision by failing to make its LCA available for public examination at either its Diamond Bar headquarters or Fremont branch office. In this regard, Mr. Balakrishnan and Mr. Trimbakkar have asserted that Synergy’s LCA was not available at either of these two offices. In contrast, Synergy’s witnesses have testified that copies of the LCA were available for inspection at both offices. The Prosecuting Party contends that greater weight should be given

to the testimony of Mr. Balakrishnan and Mr. Trimbakkar on the grounds that they allegedly have no reason to lie about this subject. The Prosecuting Party's argument is unconvincing. In fact, it appears that Mr. Balakrishnan and Mr. Trimbakkar may well have made misrepresentations about the availability of the LCA in order to give credibility to their claims that Synergy had agreed to pay them each \$65,000 per year. It is therefore concluded that the weight of the evidence does not warrant a finding that Synergy violated the provisions of 20 C.F.R. §655.760(a).

6. Providing Copies of the Labor Condition Application as required by 20 C.F.R. §655.734(a)(3)

The Administrator does not seek the imposition of any civil penalty against Synergy for violating the provisions of 20 C.F.R. §655.734(a)(3). However, the Administrator does contend that Synergy violated this provision by failing to send Mr. Balakrishnan and Mr. Trimbakkar copies of their LCA by their first day of work. In this regard, Mr. Balakrishnan testified that he didn't receive a copy of the LCA until November of 2001 and Mr. Trimbakkar contends that he never received it. This testimony is contradicted by the declaration of Ms. Vibhakar, who represented that she mailed copies of the LCA to both Mr. Balakrishnan and Mr. Trimbakkar on March 24, 2001. It is concluded that even if Ms. Vibhakar's representation about mailing copies of the LCA to Mr. Balakrishnan and Mr. Trimbakkar on March 24, 2001 is true, Synergy still violated the provisions of 20 C.F.R. §655.734(a)(3). This conclusion is compelled by the fact that by all accounts Mr. Balakrishnan and Mr. Trimbakkar began working for Synergy at least six weeks prior to March 24, 2001.

### **ORDER**

1. The Respondent shall pay \$7,535 in back wages to Mr. Balakrishnan and \$14,920.10 in back wages to Mr. Trimbakkar.

2. The Respondent shall pay a \$5,000 civil penalty to the Wage and Hour Division of the United States Department of Labor.

**A**

Paul A. Mapes  
Administrative Law Judge

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

