**U.S. Department of Labor**

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**Issue Date: 21 March 2005**

CASE NO: 2004-LCA-00030



In the Matter of:

**ADMINISTRATOR, WAGE AND HOUR DIVISION**
Prosecuting Party

v.

**WINGS DIGITAL CORPORATION**
Respondent

Appearances: Jeffrey Rogoff, Esquire
For the Prosecuting Party

Maninder Sethi
Lay Representative for Respondent

Before: PAUL H. TEITLER
Administrative Law Judge

## DECISION AND ORDER

This matter arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1101(A)(15)(H)(i)(b) and U.S.C. § 1182(n) (2001) ("the Act"), and the regulations promulgated thereunder, which can be found at 20 C.F.R. Part 655.

Under the Act, employers seeking to employ H-1B nonimmigrants must file a labor condition application ("LCA") with the Secretary of Labor. 8 U.S.C. § 1182(n)(1). Labor Condition Applications must state, *inter alia*,

1. That the employer will pay the employee the greater of the prevailing wage rate or the actual wage paid to all other individuals with similar experience and qualifications performing the same job.

2. The number of workers sought, the occupational classification in which they will be employed and the wage rate and conditions under which they will be employed.

8 U.S.C. § 1182(n)(1).

An employer violates the Act if it misrepresents a material fact or fails to meet a condition specified in the LCA. 8 U.S.C. § 1182(n)(2)(A).

On April 29, 2004, the Administrator of the Wage and Hour Division ("the Administrator") issued a determination letter to Wings Digital Corporation ("Respondent"), stating that Respondent owed back wages to six of its H-1B employees.[1] Respondent requested a hearing in this matter on May 10, 2004. The hearing was held on September 20, 2004 in New York City.[2] The following underpayments for those 6 individuals are currently alleged by the Administrator:

| Employee | Total Underpayment Alleged |
|---|---|
| Chandrasekhar "Raj" Adhav | $7,082.31 |
| Sronivas Bolugoddu | $18,533.00 |
| Daniel Dobrev | $19,142.31 |
| Jyotika Narag | $8,843.47 |
| Dimitar Petrov | $11,021.15 |
| Rajineesh Tyagi | $15,436.85 |
| Total | $80,059.09 |

Also at issue is whether Respondent failed to offer the same health benefits to its H-1B employees as it offers to its other employees, in violation of the Act.

## I. Evidentiary Rulings

At the hearing, I granted Respondent 10 days to submit paychecks issued to Jyotika Narag, one of the employees for whom the Administrator alleges underpayment. Respondent did submit those checks and they are herewith admitted into evidence. I also received additional evidence from both parties following the hearing, although neither party requested leave to submit such evidence. Therefore, all other submissions made post-trial are excluded.[3]

## II. Summary of Facts

At the September 20, 2004 hearing, the Administrator offered the testimony of two investigators for the Department of Labor, Wage and Hours Division. Janet Johnson serves as a compliance officer and has for the past 19 years (Tr. at 31). She became involved in this investigation in April, 2002 after a complaint was received from one of Respondent's former H-1B employees. (Tr. at 32). Mary Dodds is a Regional Enforcement Coordinator and the Regional Immigration Coordinator who has been

[1] The letter stated that the back wages totaled $86,059.09, but the Administrator has since revised that amount to $80,059.09.
[2] The transcript of the hearing consists of 279 pages and will be cited as "Tr. at --."
[3] Respondent submitted affidavits with its brief, which the Administrator objected to. However, the Administrator submitted additional evidence post-trial that I have to assume would have been objected to had Respondent been represented by counsel.

employed by the Wage and Hour Division for 26 years. (Tr. at 195). She has participated in approximately 300 H-1B investigations.(Tr. at 196).

The investigation involved the time period between December of 2000 and December of 2002. (Tr. at 33). As a result of the investigation, it was determined that Respondent violated the Act by failing to (1) pay the required wage, (2) offer equal eligibility for benefits and (3) make the LCA's and other documents available for examination. (Tr. at 35). In response to a determination letter (CX-1) setting out the aforementioned violations, Ms. Johnson scheduled an appointment to meet with Respondent and met with Mr. Rehani, Respondent's representative, at Respondent's place of business in Hicksville, New York. (Tr. at 38-39). Ms. Johnson testified that Mr. Rehani informed her that some of the H-1B workers had worked only part-time due to a lack of work. (Tr. at 40). Ms. Johnson also testified that the documentation provided by Respondent was insufficient, as it did not contain the personal information of the employees, such as addresses and telephone numbers, and did not contain pertinent business information, such as whether benefits were made available and at which work sites the H-1B employees worked. (Tr. at 40). Ms. Johnson again met with Mr. Rehani in November of 2002, at which time Mr. Singh, Respondent's vice president at the time, was also present. (Tr. at 45). Again, according to Ms. Johnson's testimony, Mr. Rehani stated that some employees were working part-time due to a lack of work. (Tr. at 45-46). Ms. Johnson also testified that she made additional appointments to meet with Respondent, but those meetings were not kept by Respondent's representatives, including Mr. Sethi (Tr. at 48), who was the president at the time that the investigation was being conducted. (Tr. at 33).

Ms. Dodds testified regarding many of the technicalities required by the Act. For example, she testified that the I-129 forms, many of which are in evidence are person specific and are filled out only after the LCA has been certified. (Tr. at 197). According to Ms. Dodds, if the LCA and I-129 forms indicate that an H-1B employee is a full-time employee, then that employee was to be paid as such unless a new LCA was certified and a new I-129 filed, indicating the part-time status of the employee. (Tr. at 202-03). In addition, it is impermissible to reduce an employee's salary beneath what is specified in the LCA, and in order to have an H-1B worker approved under another job classification, a new LCA would have to be filed. (Tr. at 272). Ms. Dodds testified that each pay period must be investigated separately, and that excess payments made in one pay period cannot be used to offset the amount owed for other pay periods. (Tr. at 225).

Ms. Dodds also testified that Respondent was specifically asked to provide any records that would explain periods of non-payment, and only one document, relating to Mr. Petrov, was produced. (Tr. at 273-275).

Mr. Sethi testified on behalf of Respondent. According to his testimony, Mr. Rehani sent a letter to the Department of Labor stating that some H-1B employees were working less than full-time due to personal problems. (Tr. at 254). However, Mr.

Rehani was present at the hearing but did not testify and no documentary evidence supports this contention.

Former employees, Jyotika Narag and Chandrashekher Adhav also testified on behalf of the prosecuting party. Former employee Srinivas Bolugoddu testified on behalf of the Respondent. The Administrator offered 38 exhibits into evidence and Respondent offered 11 exhibits into evidence.[4] Post-hearing briefs were filed on behalf of both parties.[5]

The remaining testimonial and documentary evidence will be discussed below according to which employee it relates to.

**A. Chandrashekher "Raj" Adhav**

An I-129 form regarding Mr. Adhav is in evidence. (CX-9). The form was signed by Kulbir S. Sabharwal, Respondent's Vice President, on August 25, 2000. The rate of pay was specified as $52,000 per year and his job title noted to be Information Technology Consultant. Also included as part of CX-9 is the LCA that was filed in relation to Mr. Adhav. According to that form, the prevailing wage rate for an Information Technology Consultant was higher than the actual rate of pay being offered by Respondent, and therefore Respondent was required to pay the prevailing rate, which was noted as $51,800 per year. This form was also signed by Mr. Sabharwal and was dated August 14, 2000. (CX-9). It specified that Respondent's employment was expected to begin on August 15, 2000 and end on August 14, 2003. The approval of the I-129 form filed in relation to Mr. Adhav is also in evidence. (CX-8). This form states that "The foreign worker(s) can work for the petitioner, but only as detailed in the petition and for the period authorized. Any change in employment requires a new petition." (CX-8).

Mr. Adhav's W-2 for 2001 (CX-11) indicates that he earned $32,876 from Respondent in 2001. A Form 1099 shows that Mr. Adhav received an additional 6,841 dollars from Respondent in 2001.(CX-12).

Mr. Adhav testified at the September 20, 2004 hearing. He received a Bachelor's degree in engineering in 1997 in India and a Masters degree in 2002 in Germany. (Tr. at 155). He worked as an H-1B employee for Frontier Solutions as a Program Analyst before working under the same job title for Respondent. (Tr. at 155). According to his testimony, he was hired to work in-house for Respondent but was later sent to work at various client sites. (Tr. at 156). He was supposed to be paid a salary of $45,000 per year and was to receive benefits, including medical insurance, 2 weeks vacation and sick time. (Tr. at 156-57). He was a full-time employee. (Tr. at 158).

[4] The Administrator's exhibits are cited as "CX-1" through "CX-38" and the Respondent's exhibits will be cited as "RX-1" through "RX-11."
[5] Only the Administrator's brief is cited herein and is cited as "AB at --."

Mr. Adhav testified that while working for Respondent, he was given 2 raises, the first raised his salary to $50,000 per year (despite the fact that this was still lower than the required wage as specified on the LCA) and the second raised his salary to 65,000 dollars per year. (Tr. at 157). He testified that he was given no documentation of the second raise except an email which was not produced before or at trial. (Tr. at 168). However, Mr. Adhav did begin receiving more compensation, as reflected by the payroll records. According to Ms. Dodds' testimony, Mr. Adhav's paycheck went from $1,922 per pay period to 2,212 dollars per pay period in May of 2001, and later increased to 2,500 dollars. (Tr. at 212). Ms. Dodds' testimony is corroborated by Respondent's payroll records (CX-3), which show that Mr. Adhav received additional compensation, as much as 577 dollars per pay period, reflected by a Form 1099. Mr. Adhav testified that he believed that these payments represented his raise. (Tr. at 174). Respondent, however, introduced a letter (RX-5) to show that the Form 1099 payments were a loan that Respondent made to Mr. Adhav. (Tr. at 100). However, Mr. Adhav testified that he was never in need of a loan. (Tr. at 165). Respondent also points to CX-10, claiming that this letter was evidence that Mr. Adhav's salary was raised to $52,000. Mr. Adhav testified that he never received this letter (Tr. at 188), but this letter is actually the letter of appointment and does not concern a raise. Finally, Ms. Johnson testified that if Mr. Adhav received the raise to 65,000, that was his actual wage, which was greater than the prevailing wage, and therefore Respondent was required to pay him the actual wage from that point on. (Tr. at 97-98).

Mr. Adhav also testified that he received no pay from Respondent between February 5 and February 18, 2001; September 17 and September 30, 2001 and October 1 and October 14, 2001. (Tr. at 160). During discovery, Respondent admitted that Mr. Adhav was not paid for the period ending on February 18, 2001, but attributed the nonpayment to personal time off. (CX-34, Admission 63). Again at trial, Mr. Sethi alleged that Mr. Adhav was not paid for the period in February because he was vacationing in England, but Mr. Adhav testified that he went to England only for a long weekend and only took off Friday, February 14, since Monday was a work holiday. (Tr. at 176). Mr. Sethi noted that his records reflect that Mr. Adhav took the entire month of February off, to which Mr. Adhav responded that he was working out of Respondent's Manhattan office. (Tr. at 177). In addition, Mr. Adhav was paid for the periods immediately preceding and following the February 18 pay period, indicating that he was not absent from work for an entire month. (CX-3). Mr. Adhav also testified that when he spoke to Respondent's vice president, Mr. Sagi, he was told that he was not being paid for certain pay periods because he was unprofitable to the company due to the fact that he was not working for an outside client during those times. (Tr. at 161).

Respondent admitted, at least once, that it did not pay Mr. Adhav for the pay period ending September 30, 2001, but contends that it was because he had been over paid in the previous pay period. (CX-34, Admission 62). According to Ms. Dodds, the payroll records (CX-3) indicate that Mr. Adhav actually was paid but Wage and Hour found his testimony that he never received the check to be credible, especially in light of the following emails that substantiated his testimony:

An October 26, 2001 email (CX-32) reads:

> Gautam:
>
> Its end of my patience now. You said Wednesday but now its Friday and I still haven't received the check. Its been close to a month now. Anyway, I dont want to work with you anymore after all this and would not be afraid of making a complaint against Wings. Since we had some good time, I would wait for your reply, you can either email me or call me at 0049 781 966 6818 to settle it before it goes out of control.
>
> Please DO NOT take this lightly.
>
> Thanks,
> Raj

A November 2, 2001 email regarding the missing pay check (CX-32) reads:

> Gautam,
>
> I still haven't got the pay check. Are you going to do something about it? Please let me know.
>
> Thanks,
> Raj

Respondent admits that it did not pay Mr. Adhav for the pay period ending October 15, 2001, because, according to Respondent, Mr. Adhav had been terminated as of September 30, 2001. (CX-34, Admission 61). Correspondence by email on September 21, 2001 indicates that the project that Mr. Adhav had been working on ended that day and that Mr. Gautam had begun submitting Mr. Adhav's resumes to other clients. Also, Mr. Adhav indicated that the following Friday would be his last day of work with the company and that his last paycheck should be mailed to a new address. (CX-32). Mr. Adhav, according to his own testimony, was available to work for Respondent until October 13, 2001, at which time he would be leaving for Germany. (Tr. at 158). However, he did no work for Respondent beyond September 28, 2001 because he turned down the job assignment that Respondent offered him because it was a long term project that would extend beyond October 13. (Tr. at 158-59). A letter addressed to INS is in evidence (CX-13) but Mr. Adhav testified that he never saw the letter, was not notified of it and was not notified that he was terminated as of October 1, as the letter stated. (Tr. at 160). The letter addressed to INS contains the wrong EAC number and Mr. Adhav was never contacted by INS regarding the revocation of his H-1B status. (Tr. at 191). The letter states that Respondent wished to withdraw the I-129 petition filed on behalf of Mr. Adhav and that Mr. Adhav's employment had been terminated and he was no longer on Respondent's payroll. (CX-13). The letter was dated October 1, 2001 and was signed by Mr. Sethi. (CX-13). Mr. Adhav testified that

he did not send a resignation letter to Respondent because Mr. Gautam had told him that he could continue working for Respondent when he came back from Germany. (Tr. at 168).

Regarding his health benefits, Mr. Adhav testified that his initial appointment letter (CX-10) provided that he would receive benefits. (Tr. 182). The appointment letter does in fact read:

> We are pleased to offer you employment with Wings Digital Corp. You will be employed with in the capacity of Information Technology Consultant at an annual Gross Salary of $52,000.00, which includes full medical insurance of $ 6,000.00 per year. In addition to your salary you will be entitled for two weeks of paid vacation for every full year of employment and one week of sick leave. (CX-10).

However, Mr. Adhav learned that his insurance was cancelled when he went to the doctor and his insurance carrier would not cover the expense because he was no longer covered. (Tr. at 166). Mr. Adhav called Mr. Sagi, who assured him that benefits would be reinstated and he was given a temporary insurance identification number, but that number was not honored. (Tr. at 167). After July 7, 2001, Respondent did not deduct any money from Mr. Adhav's paycheck for medial insurance (Tr. at 167; CX-3). Ms. Johnson testified, and Respondent's payroll records reflect, that deductions were taken for medical benefits from the paychecks of non-H-1B workers. (Tr. at 50; CX-3). Mr. Adhav testified, and the bill from the Waltham Medical Group (CX-7) indicates that Mr. Adhav did incur a medical expense of $90 on September 7, 2001, and he still owed $75 for that medical expense as of the date of trial. (Tr. at 167). Respondent admits that Mr. Adhav's medical insurance was cancelled in June of 2001, but alleges that it was cancelled at Mr. Adhav's request. (CX-34, Admissions 64-65; RX-6).

### B. Sronivas Bolugoddu

According to Mr. Bolugoddu's testimony, he began working for Respondent as an Information Technology Assistant in July of 2000.[6] (Tr. at 232). He testified that Respondent does not owe him any money and that he was paid $50,000 per year when he first started working for Respondent. However, he earned less for approximately 6 to 8 months, because he was working less hours due to personal problems. That period of 6 to 8 months began in February or March of 2002, to the best of Mr. Bolugoddu's recollection. (Tr. at 239, 243). He testified that he was working approximately 30 hours per week in August of 2004 when he received a pay check in the amount of $1,538. (Tr. at 246). He testified that his pay later dropped to $913 per pay period because he had taken a salary advance. (Tr. at 247). In April of 2001, Mr. Bolugoddu's paychecks again rose to $1,538. (Tr. at 247; CX-3). He testified that he was still working fewer than 40 hours per week at that time, but could not even estimate how many hours he was working. (Tr. at 248).

[6] Mr. Bolugoddu later testified that he began working for Respondent in August of 2000. (Tr. at 242).

The I-129 petition was signed by Mr. Sethi on July 7, 2000. (CX-15). It specified that Mr. Bolugoddu was being hired as an Information Technology Consultant beginning July 24, 2000 and would be paid $50,000 per year. (CX-15). The LCA, however, showed that the prevailing wage rate according to Watson Wyatt Data Service was $50,900 per year. Further, the Administrator offered the Watson Wyatt report (CX-38) to show that the prevailing wage was actually $51,800.

CX-14 is the approval of the I-129 form filed in relation to Mr. Bolugoddu. Again, this approval reads, "The foreign worker(s) can work for petitioner but only as detailed in the petition and for the period authorized. Any change in employment requires a new petition." (CX-14). The I-129 petition specified that Mr. Bolugoddu was to work full-time. (CX-15).

Mr. Bolugoddu's W-2 for 2001 indicates that Respondent paid him 34,908 dollars that year. (CX-16). A 1099 shows that Respondent made an additional payment of 2,692 dollars to Mr. Bolugoddu in 2001. (CX-17).

Notably, Respondent is sponsoring Mr. Bolugoddu to get a green card. (Tr. at 257).

**C. Daniel Dobrev**

The I-129 filed in relation to Mr. Dobrev (CX-19) indicates that Mr. Dobrev was being hired as a Production Engineer and that the intended period of employment was from October 1, 2000 until September 30, 2003. The I-129 was signed by Mr. Sethi on August 3, 2000 and states that employment was to be full-time and that Mr. Dobrev would be paid $48,500 per year. (CX-19). The LCA filed in relation to Mr. Dobrev's employment specifies that while the actual wage for this position is $48,500 per year, the prevailing wage rate according to Watson Wyatt Data Survey was $50,600 per year. (CX-19). The LCA was also filed by Mr. Sethi. (CX-19). The approval of the I-129 form filed in relation to Mr. Dobrev's employment is in evidence. (CX-18). Again, the approval notice reads, "Changes in employment require a new petition." (CX-18).

Mr. Dobrev's W-2 form indicates that Respondent paid him $28,850 in the year 2001. (CX-20). There is no indication that Respondent paid Mr. Dobrev any other sum of money in 2001. In addition, Respondent admits that Mr. Dobrev was employed from February 2001 through December 2002. (CX-34, Admission 11).

Respondent offered into evidence a letter dated June 20, 2001 (RX-11), which is signed by Ray Kissel and states that Mr. Dobrev's qualifications are not as demonstrated by his resume and therefore Mr. Dobrev is not qualified to work as a Production Engineer. The letter goes on to say, "As you requested to myself that you want to stay in Bulgaria and are ready to accept a demotion as Asst Production Engineer in Mastering Dept. with a salary of USD 650 per week." (RX-11)

### D. Jyotika Narag

Ms. Narag testified at the September 20, 2004 hearing. She testified that she holds a Bachelor's degree in English from Delhi University in India and has ten years experience in the marketing field, including a tenure as Senior Marketing Manager. (Tr. at 110-11). She was hired by Respondent, at the time that Mr. Sethi was president, as a Market Research Analyst and was to work full-time, earning $35,000 per year. (Tr. at 112). However, Ms. Narag worked full-time for approximately one year, between March 2001 and March 2002, as a Production Assistant, then worked as a full-time Sales Assistant. (Tr. at 114-15). During that time, she was being paid $1,500 per month, according to her testimony (Tr. at 115) and Respondent's payroll records indicate that she was being paid even less. (CX-3). She testified that she approached Mr. Sethi regarding the underpayment and was told that she should be happy that she was able to stay in the country and earn as much as she was earning. (Tr. at 115). Ms. Narag testified that as a result of the decrease in her expected salary, she was forced to abandon a property that she had rented in Jersey City and lost about $3,750 as a result of breaking the lease. (Tr. at 115-16).

Ms. Narag testified that she was not paid for one pay period in April of 2002 and one in May of 2002. (Tr. at 116). She was, however, overpaid in the other pay period of each month, when her pay checks were for an amount double the amount she usually received. (Tr. at 118). When she asked Mr. Sethi why this was the case, he informed her that it was because of an investigation by the Department of Labor, according to Ms. Narag's testimony. (Tr. at 117).

In addition, Ms. Narag alleged that although she worked for Respondent until September 15, 2002 (Tr. at 124), she received no pay checks after June 8, 2002 (Tr. at 116) and was given pay stubs in August of 2002, but no checks. (Tr. at 118-19). She identified shipping invoices bearing her signature and a date of September 9, 2001 (CX-6) to prove that she worked for Respondent at least until that date. (Tr. at 121). Ms. Johnson also testified that the payroll records that Respondent produced before trial reflected that Ms. Narag was not paid between June and September of 2002. (Tr. at 51). However, paychecks were offered into evidence at the hearing (RX-1) bearing Ms. Adhav's signature and a number that is associated with Ms. Narag's bank account (RX-1; CX-34) which shows that Ms. Narag did actually receive and cash the checks. Ms. Narag initially alleged that the checks were fake and testified that she had never seen them before. (Tr. at 134). However, the final check issued to Ms. Narag was for the pay period ending August 18, 2002. Although Ms. Narag testified that she never received the letter introduced by Respondent as RX-4, this letter shows that Ms. Narag was employed at least until September 6, 2002.[7]

[7] RX-4 is a termination letter dated August 19, 2002, stating that Ms. Narag's employment was being terminated as of September 6, 2002. (RX-4). Ms. Narag, however, testified that she departed from Respondent because Mr. Sethi suggested that she look for a new job due to the fact that the Department of Labor investigation was intensifying. (Tr. at 124).

Ms. Narag also testified that she asked Mr. Sethi about benefits but was always told that she should be grateful that Mr. Sethi sponsored her for an H-1B visa. (Tr. at 123). She estimated that she incurred $1,000 in health expenses while in the employ of Respondent but offered no evidence to corroborate this testimony. (Tr. at 124).

Ms. Narag also testified that the $1,100 fee for the filing of the H-1B application was deducted from her pay by Respondent. (Tr. at 113).

Respondent also produced a letter (RX-3), which purports to explain the underpayments. It is dated September 1, 2001, and states that due to the fact that Ms. Narag stated at a meeting that she was unable to work 5 days per week, her weekly pay would be adjusted proportionately to the number of days she worked per week. (RX-3). Ms. Narag testified that she had never received this letter. In addition, Ray Kissel, who purportedly signed the letter on behalf of Respondent is deceased according to Mr. Sethi.[8] (Tr. at 141). According to the testimony of Mr. Bolugoddu, Ms. Narag was having health and personal problems and was working approximately 20 hours per week. (Tr. at 234). He accused Ms. Narag of being an alcoholic. (Tr. at 234). On cross-examination, he admitted that he was never a supervisor while working for Respondent and never had a duty to monitor the work schedules of other employees. (Tr. at 240). Ms. Narag, on the other hand, testified that she only took 11 sick days, possibly a few more while employed by Respondent. (Tr. at 142).

According to Ms. Johnson's testimony, Ms. Narag contacted her in March 2003 alleging nonpayment of wages between June and September of 2002 and stated that she had not come forward earlier because she was afraid that she would be terminated by Respondent. (Tr. at 46). In addition, she complained that she was hired as a Market Research Analyst but did not work in that position and made only one-half of what she was told she would be paid in that position. (Tr. at 46). When Ms. Johnson requested additional payroll records from Respondent regarding Ms. Narag, she was not provided with the records that Respondent introduced at trial. (Tr. at 48).

The I-129 petition specified that Ms. Narag was being hired as a full-time Market Research Analyst and would be paid $35,000 per year and listed March 12, 2001 until March 1, 2004 as the expected dates of employment. (CX-22). The petition was signed by Respondent's vice president. The LCA listed the prevailing wage as $26,124 per year. (CX-22). The approval of the I-129 petition filed in relation to Ms. Narag's employment, like the others, specifies, "Any change in employment requires a new petition." (CX-21).

Ms. Narag's W-2 shows that she earned only 5,390 dollars from Respondent in 2001. (CX-23).

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[88] I also note that Mr. Kissel was mentioned rarely during the trial and that the former employees testified regarding other representatives of Respondent with whom they dealt with certain issues that arose. Yet, a majority of the letters that Respondent offered into evidence are either addressed to or signed by Mr. Kissel, who could not testify since he is deceased. Thus, I give little weight to those letters.

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### E. Dimitar Petrov

The I-129 petition filed in relation to Mr. Petrov's employment indicates that he was expected to work for Respondent between December 1, 200 and October 31, 2003, as a full-time Production Engineer. (CX-25). He was to be paid $48,500 per year. (CX-25). The form was signed by Mr. Sethi on October 18, 2000. The LCA was signed by Mr. Singh on September 13, 2000 and indicates that the prevailing wage for a Production Engineer was $50,600 per year. (CX-25).

Mr. Petrov's W-2 indicates that he earned $20,450 dollars from Respondent in the year 2001. There is also a 1099 in evidence that shows that Respondent made an additional payment of $3,600 to Mr. Petrov in 2001. (CX-27).

According to Mr. Sethi, Mr. Petrov submitted a letter to Respondent explaining that he needed to return to Bulgaria because his child was sick. (Tr. at 258). The letter is dated June 1, 2001 (CX-6) and asks permission to return to Bulgaria in December of 2001, July of 2002 and December of 2002. It also states that Mr. Petrov would be working less hours in the months following the letter due to back problems. (Tr. at 261). Another letter from Mr. Petrov, dated November of 2002, is in evidence (RX-10). It states that Mr. Petrov must return to Bulgaria due to his son's illness and the necessity for his family to move to a new home. According to the letter, the stay would be for an uncertain period. (Tr. at 261).

Ms. Dodds pointed out that she was provided information regarding a leave of absence during her investigation, but that the information did not match that contained in CX-6 or RX-10, discussed above. (Tr. at 264). In fact, when asked to produce documents relating to any periods of non-payment for any of the 6 employees, the only document that Respondent produced was CX-38, which is an internal memo dated November 25, 2001 addressed to Respondent's payroll department and signed by Respondent's plant manager. The plant manager stated in this memo that Mr. Petrov was vacationing in India beginning on November 28, 2001. It also states that Mr. Petrov had 1 week of vacation time and that the time that he remained in India beyond December 10, 2001 would be considered an unpaid leave of absence. (CX-38). Mr. Sethi responded that the other documents regarding underpayments to Mr. Petrov were not produced during the investigation because they were in a storage house. (Tr. at 267).

At the hearing, it was noted that there was a transcription error regarding a May 20, 2002 payroll record for Mr. Petrov. While Ms. Dodds mistakenly gave Respondent a credit of 1,615 dollars for that check, it was actually in the amount of 1,950 dollars, therefore reducing the amount of back wages allegedly owed by 335 dollars. (Tr. at 256-58). This reduction is reflected in the Administrator's brief. (AB at 3, n. 4).

### F. Rajineesh Tyagi

According to the I-129 petition, Mr. Tyagi was to work for Respondent as a full-time Information Technology Consultant, earning 50,000 dollars per year. Employment was intended to begin on July 24, 2000 and end July 23, 2003. (CX-29). The petition was signed by Mr. Sethi on June 28, 2000. The LCA is also signed by Mr. Sethi and indicates that the prevailing wage rate for this position was 50,900 dollars per year according to the Watson Wyatt Data Service. (CX-29). Again, the approval of Mr. Tyagi's I-129 petition states, "The foreign worker(s) can work for the petitioner, but only as detailed in the petition and for the period authorized. Any change in employment requires a new petition." (CX-28).

Mr. Tyagi's W-2 form for the year 2001 shows that Respondent paid him 40,429 dollars during 2001. A Form 1099 indicates that Respondent made an additional payment to Mr. Tyagi in the amount of 350 dollars. (CX-31).

Respondent offered a letter into evidence that states that Mr. Tyagi would be working less hours due to the pregnancy of his wife. (RX-8). The letter is dated November 6, 2000 and asks that his salary be adjusted accordingly. (RX-8).

## III. Discussion

In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the United States Supreme Court held that once an employee has shown that he performed work and was not properly paid for it, and he produces sufficient evidence of the amount and extent of work as a matter of just and reasonable inference, the burden shifts to the employer to produce evidence of the precise amount of work what was performed or evidence to negate the inference created by the employee's evidence. *Id.* at 687-88. The Court explained that it is the employer's duty to keep precise records and that such a burden should not fall on the employee and bar the employee from recovery when such records cannot be produced. *Id.* at 687. Although *Mt. Clemens Pottery* involved a claim brought under the Fair Labor Standards Act, the Supreme Court's holding has been adopted in deciding claims brought under other acts, such as the Davis-Bacon Act (*see In the Matter of Permis Construction Corp.*, 1991 WL 494686 (DOL W.A.B. 1991), and most notably, by the Administrative Review Board in an LCA case (*see Administrator, Wage and Hour Division v. Ken Technologies, Inc.*, 2004 WL 2205233 (Adm. Rev. Bd. 2004). Thus, if I initially find that the Administrator has established that Respondent failed to properly compensate the H-1B nonimmigrant workers, then Respondent bears the burden of establishing the existence of circumstances that warrant the wages not being paid or benefits not being offered, by a preponderance of the evidence. *Administrator, Wage and Hour Division v. Ken Technologies, Inc.*, 2004 WL 2205233 *2 (Adm. Rev. Bd. 2004). Otherwise, Respondent is liable for the payment of back wages and other financial remedies.

Violations of the Act can occur in several ways. First of all, the Act unequivocally requires the employer to pay an H-1B employee the greater of the prevailing wage or the actual wage that it pays to other workers of like qualifications who are working in the same position as the H-1B nonimmigrant. 8 U.S.C. § 1182(n)(1)(A)(i). The regulations provide that "The required wage must be paid to the employee, cash in hand, free and clear, when due, *except that* deductions made in accordance with paragraph (c)(9)[9] of this section may reduce the cash wage below the level of the required wage. 20 C.F.R. § 655.731(c)(1). In addition, the regulations state that "cash wages paid" must be shown in the employer's payroll records as earnings and disbursed to the employee, cash in hand, and must be reported to the IRS as employee's earnings, with appropriate tax withholdings. 20 C.F.R. § 655.731(c)(2)(i) and (ii). In addition, if the nonimmigrant works in an occupation other than the one specified in the LCA, the employer is required to pay the wage identified on the LCA, regardless of the wage that would be applicable in the occupation in which the employee is actually working. 20 C.F.R. § 655.731(c)(8).

It is also a violation of the Act for an employer to place an H-1B worker in nonproductive status based on the employer's own decision, and to neglect paying the H-1B worker for any such nonproductive time. 8 U.S.C. § 1182(n)(2)(C)(vii)(I). However, the employer has no obligation to pay an H-1B nonimmigrant worker for nonproductive time that is the result of non-work-related factors, including the worker's request for time off. 8 U.S.C. § 1182(n)(2)(c)(vii)(IV). In addition, the employer is not obligated to pay a nonimmigrant H-1B employee if a bona fide termination has taken place. The employer is required to notify INS of such termination so that the petition can be canceled and is required to provide the employee with payment for transportation home in certain cases. § 655.731(c)(7).

An employer also has a duty to notify INS "immediately" of any changes in the terms and conditions of an H-1B nonimmigrant's employment. 8 C.F.R. § 214.2(h)(11).

In addition, 20 C.F.R. § 655.731(c)(10)(ii) specifically prohibits the employer from collecting from the employee and the employee from paying to the employer the H-1B filing fee.

The Act also mandates that an H-1B non-immigrant be offered benefits and eligibility for benefits on the same basis and according to the same criteria that such benefits are offered to United States workers. 8 U.S.C. § 1182(n)(2)(C)(viii).

[9] Subsection (c)(9) relates to a deduction required by law, such as income tax; a deduction which is authorized by a collective bargaining agreement or is reasonable and customary in the occupation or area of employment; or a deduction made in accordance with a voluntary, written authorization by the employee that is principally for the benefit of the employee and is not a recoupment of the employer's business expense, including the expense associated with the filing of an LCA or H-1B petition. 20 C.F.R. § 655.731(c)(9)

### A. Chandrashekher "Raj" Adhav

Respondent admits that Mr. Adhav was not paid for the 3 pay periods at issue and offered a reason for each period of nonpayment. Because Respondent has made these admissions, the burden falls on it to show a legitimate reason for the nonpayment by a preponderance of the evidence.

Regarding the pay period ending on February 18, 2001, Respondent offers a letter denying Mr. Adhav's request for vacation. However, Mr. Adhav denies ever seeing that letter and it is not signed by him. Further, Mr. Adhav testified that he took only one day off during that period and went away for a long weekend. Respondent has no records, such as time cards, which would establish that Respondent was on vacation and Mr. Sethi's testimony conflicts with the payroll records, which indicate that Mr. Adhav was not out of work for a month. Therefore, Respondent has failed to meet its burden and must pay Mr. Adhav backwages for this pay period.

Regarding the September 30, 2001 nonpayment, Respondent argues that it had advanced Mr. Adhav money and therefore he was not entitled to a paycheck for that period. This argument fails for three reasons. First, it is well-settled that each pay period is to be viewed separately when determining whether an H-1B worker was paid the required wage. No credit is due for overpayments that occurred in other pay periods. Secondly, the regulations state that in order to qualify as a wage, the payment must be reported to the IRS as an employee's earnings, with appropriate tax withholdings. Because this alleged advance was reported to the IRS using a Form 1099, the proper taxes were not withheld and in fact, Respondent was able to escape tax liability that it normally incurs when regular payroll payments are made to its employees. Finally, Respondent failed to prove by a preponderance of the evidence that such loan was actually made. I therefore find that Respondent must pay Mr. Adhav backwages for the pay period ending September 30, 2001.

Regarding the pay period ending October 14, 2001, Respondent maintains that it did not pay Mr. Adhav because he had been terminated. The Administrator argues that Mr. Adhav had not been terminated and was available to work until October 14. However, I find that Respondent has proven by a preponderance of the evidence that it had a legitimate reason for not paying Mr. Adhav. The evidence shows that Respondent offered Mr. Adhav work for that pay period and Mr. Adhav refused it because it was a long-term project which he would not be able to finish since he was leaving for Germany in mid-October. Respondent's duty was to offer its H-1B employees work or else to pay them despite those periods of nonproductivity. However, Respondent had no duty to pay Mr. Adhav for nonproductive time that resulted from non-work-related factors, such as Mr. Adhav's own choice to travel to Germany. I find that Respondent fulfilled its obligation by offering Mr. Adhav work in this pay period and has no obligation to pay Mr. Adhav for the pay period ending on October 14, 2001, during which Mr. Adhav could not work due to his own circumstances.

In addition to the wages for the periods of nonpayment discussed above, Respondent is liable for the medical expenses that were incurred by Mr. Adhav after it ceased offering him medical benefits. At trial, Mr. Adhav testified that his benefits were wrongly terminated and that he approached Respondent's representative regarding the situation and was given false assurances. Respondent did not attempt to refute this testimony at the time of trial, although there is mention of the benefits being canceled at Mr. Adhav's request in RX-6. However, I am not persuaded by that letter, which is signed by Mr. Kissel, as it rights all of Respondent's wrongs associated with Mr. Adhav's pay and benefits.[10] Because I find that Respondent did not meet its burden of showing by a preponderance of the evidence a legitimate reason why Mr. Adhav's medical benefits ceased, Respondent is liable for the $90 owed on the medical bill that Mr. Adhav incurred as a result of the lapse in his insurance coverage.

In sum, Respondent owes Mr. Adhav $4,582.31, as outlined below:

| PAY PERIOD ENDING | REQUIRED WAGE | AMOUNT PAID | AMOUNT OWED |
|---|---|---|---|
| 12/23/00 | $1,992.31 | $0 | $1,992.31 |
| 09/30/01 | $2,500[11] | $0 | $2,500.00 |
| Medical Expense | | | $ 90.00 |
| **TOTAL OWED:** | | | $4,582 .31 |

**B. Sronivas Bolugoddu**

The evidence shows that Mr. Bolugoddu was to be paid $51,800 dollars per year, or $1,992.31 per pay period. However, Respondent's payroll records indicate that Mr. Bolugoddu was underpaid in 39 pay-periods between August 24, 2000 and March 21, 2002.

In order to rebut the prima facie case of underpayment, Respondent offered the testimony of Mr. Bolugoddu. However, I do not find this testimony to be credible as Mr. Bolugoddu testified that he was never underpaid and was only paid less than the required amount due to his own choice to work less hours for a period of 6 to 8 months. However, the underpayments occurred for over 18 months and ended in April of 2002, precisely at the time when Ms. Narag testified that she was overpaid by Respondent and informed that the overpayment was due to a Department of Labor Investigation. Finally, Mr. Bolugoddu admitted that Respondent is sponsoring him to obtain a green card, which undoubtedly creates bias. Because I find Mr. Bolugoddu to lack credibility and because Respondent offered no records to substantiate his testimony, I find that

[10] The letter also states that the extra $577 that Mr. Adhav began receiving was a salary advance of $6,924.00, which Respondent would pay to Mr. Adhav over 12 pay periods "as a special favor." It also stated that the $6,924 would be deducted from Mr. Adhav's salary in the last quarter, as per his request, which allows Respondent to explain the nonpayments that occurred in late September and early October of 2001.

[11] Ms. Johnson testified that if Mr. Adhav received a raise to $65,000 per year, that became his required wage. The payroll records indicate that Mr. Adhav was paid $2,500 dollars per pay period for several pay periods prior to this period of nonpayment, and therefore Respondent is required to pay him at that rate.

Respondent did not meet its burden. I therefore find that Respondent owes Mr. Bolugoddu back wages in the amount of $18,533.09, as detailed below.

| PAY PERIOD ENDING | REQUIRED WAGE | AMOUNT PAID | AMOUNT OWED |
|---|---|---|---|
| 8/24/00-1/7/01 (11 pay periods) | $1,992.31 | $1,538.00 | $454.31 x 11 pay periods = $4,997.41 |
| 02/04/01-03/04/01 (3 pay periods) | $1,992.31 | $913.00 | $1,079.31 x 3 pay periods = $3,237.93 |
| 03/18/01 | $1,992.31 | $1,730.00 | $262.31 |
| 04/01/01-7/22/01 (9 pay periods) | $1,992.31 | $1,538.00 | $454.31 x 9 pay periods = $4,088.79 |
| 09/02/01 | $1,992.31 | $1,538.00 | $454.31 |
| 09/16/01-03/21/02 (14 pay periods) | $1,992.31 | $1,600.00 | $392.31 x 14 pay periods = $5,492.34 |
| **TOTAL OWED:** | | | $18,533.09 |

**C. Daniel Dobrev**

The Administrator argues that while Mr. Dobrev should have been paid 50,600 dollars annually, or 1,946.15 per pay period, he was paid between 1,200 and 1,300 dollars for 28 pay periods, commencing February 18, 2001. (AB at 5). The payroll records kept by Respondent reflect this deficiency and therefore a prima facie case is created. In order to meet its burden then, Respondent must show by a preponderance of the evidence that there was a legitimate reason why Mr. Dobrev was underpaid during these pay periods. Respondent has offered no evidence disputing these underpayments. Instead, it offered a letter (RX-11) that states that Mr. Dobrev's salary was reduced, with his consent, because his qualifications rendered him unfit for the position originally hired for. However, the regulations promulgated under the Act specifically state that an H-1B nonimmigrant is to be paid the wage identified in the LCA, even if the individual is working in another occupation. In addition, Respondent had a responsibility to file a new application if a change such as this one occurred. Therefore, I find that Mr. Dobrev was not paid the required wage and is owed back wages in the amount of $19,142.20, as indicated below.

| PAY PERIOD ENDING | REQUIRED WAGE | AMOUNT PAID | AMOUNT OWED |
|---|---|---|---|
| 02/18/01-06/24/01 (10 pay periods) | $1,946.15 | $1,200 | $746.15 x 10 pay periods = $7,461.50 |
| 07/08/01 | $1,946.15 | $1,250 | $696.15 |
| 08/05/01- | $1,946.15 | $1,300 | $646.15 x 12 = |

| | | | |
|---|---|---|---|
| 12/22/01 (12 pay periods) | | | $7,753.80 |
| 01/19/02-03/21/02 (5 pay periods) | $1,946.15 | $1,300 | $646.15 x 5 = $3,230.75 |
| **TOTAL OWED:** | | | $19,142.20 |

**D. Jyotika Narag**

The Administrator alleged that Ms. Narag was owed back wages for periods of both nonpayment and underpayment and Ms. Narag testified to the same at trial. However, Respondent was able to produce 7 paychecks issued to Ms. Narag, which she initially accused Respondent of fabricating, but which were eventually shown to have been deposited into her bank account, therefore showing that she was paid in many of the periods alleged to have been periods of nonpayment. Not only did this decrease the amount of wages that the Administrator sought, it undermined Ms. Narag's credibility.

Still, Respondent was unable to rebut the prima facie case of underpayments made in many other pay periods. If Ms. Narag was working only part-time as Respondent alleges, Respondent had a duty to notify the Department of Labor and was made aware of this duty when the I-129 petition was approved. In addition, I cannot credit the testimony offered by Mr. Bolugoddu regarding how many hours Ms. Narag worked, since he had trouble recalling how many hours per week he was working in certain pay periods, yet attempted to testify regarding the hours worked by Ms. Narag.

In addition, I note that Respondent was required to pay Ms. Narag $27,000 per year as specified as the actual wage in the LCA, despite the fact that she was not working in the position originally hired for.

Ms. Narag is also owed back wages for one pay period in April of 2002 and one pay period in May of 2002, regardless of whether she was overpaid in the other pay period of each of those months, since Respondent had a duty to pay the required wage in each pay period, regardless of any additional payments made in other pay periods.

Finally, although Respondent produced 7 paychecks that were issued to Ms. Narag in her final months of employment, the last check is dated August 22, 2002 and is payment for work completed through August 18, 2002. Shipping labels bearing Ms. Narag's signature show that Ms. Narag worked at least until September 9, 2002, and Respondent's termination letter, which Ms. Narag testified that she never received, provided that Ms. Narag was being terminated as of September 6, 2002. Respondent was unable to show that Ms. Narag did not work until September 15, 2002, as she alleged. Since the evidence substantiates that Ms. Narag worked at least until September 9, 2002, Ms. Narag is owed additional back pay for the pay periods ending September 1 and September 15, 2002.

Based on the foregoing, I find that Respondent owes Ms. Narag $8,612.28 in back wages, as outlined below.

| PAY PERIOD ENDING | REQUIRED WAGE | AMOUNT PAID | AMOUNT OWED |
|---|---|---|---|
| 09/16/01 & 09/30/01 | $1,038.46 | $630 | $408.46 x 2 pay periods = $816.92 |
| 10/14/01 | $1,038.46 | $700 | $338.46 |
| 10/28/04 | $1,038.46 | $630 | $408.46 |
| 11/11/01 | $1,038.46 | $700 | $338.46 |
| 11/25/01 | $1,038.46 | $630 | $408.46 |
| 12/12/01 & 12/22/01 | $1,038.46 | $700 | $338.46 x 2 pay periods = $676.92 |
| 01/05/02 | $1,038.46 | $630 | $408.46 |
| 01/19/02-02/20/02 (3 pay periods) | $1,038.46 | $700 | $338.46 x 3 pay periods = $1,015.38 |
| 03/07/02 | $1,038.46 | $630 | $408.46 |
| 03/21/02 & 04/04/02 | $1,038.46 | $700 | $338.46 x 2 pay periods = $676.92 |
| 04/14/02 | $1,038.46 | $0 | $1,038.46 |
| 05/12/02 | $1,038.46 | $0 | $1,038.46 |
| 09/01/02 & 09/15/02 | $1,038.46 | $0 | $1,038.46 |
| | | | |
| **TOTAL OWED:** | | | $8,612.28 |

**E. Dimitar Petrov**

Mr. Petrov was to be paid 50,600 dollars annually or $1,946.15 per pay period based on the LCA. However, Respondent's payroll records show that Mr. Petrov was paid less than $1,300 dollars per pay period in 18 pay periods between May 27, 2001 and April 28, 2002.

Respondent offered evidence to show that Mr. Petrov did not work for certain periods of time due to a necessity to return home to care for his sick child. Although that evidence is not overwhelming, the Administrator is seeking back wages only for periods of underpayment and not for periods when Mr. Petrov did not appear on the payroll at all. I find that with regard to the periods of underpayment, Respondent has not shown a legitimate reason for them although it has produced a letter, purportedly to Mr. Kissel from Mr. Petrov, stating that due to back problems, Mr. Petrov was seeking permission to work a reduced number of hours for a few months. However, the letter is dated June 1, 2001, and the underpayments that the Administrator seeks are for a period of more than one year. Therefore, Mr. Petrov is owed $11,021.15 in back wages as shown below.

| PAY PERIOD ENDING | REQUIRED WAGE | AMOUNT PAID | AMOUNT OWED |
|---|---|---|---|
| 05/27/01-06/24/01 (3 pay periods) | $1,946.15 | $1,200 | $746.15 x 3 pay periods = $2,238.45 |
| 07/08/01 | $1,946.15 | $1,250 | $696.15 |
| 07/22/01-11/11/01 (9 pay periods) | $1,946.15 | $1,300 | $646.15 x 9 pay periods = $5,815.35 |
| 02/20/02-03/21/02 (3 pay periods) | $1,946.15 | $1,300 | $646.15 x 3 pay periods = $1,938.45 |
| 04/28/02 | $1,946.15 | $975 | $971.15 |
| 05/12/02 | $1,946.15 | $1,615 | $331.15 |
| **TOTAL OWED:** | | | $11,990.70 |

**F. Rajineesh Tyagi**

The payroll records kept by Respondent indicate that for 31 pay periods, commencing on October 6, 2000, Mr. Tyagi was paid between $1,092 and $1,850, although according to the LCA, Mr. Tyagi was to be paid $50,900 annually or $1,957.69 per pay period. Therefore, the Administrator argues that Mr. Tyagi is owed back wages in the amount of $15,436.85. In addition, while Respondent admitted that Mr. Tyagi was employed from October 2000 through December 2002, his W-2 form for 2001 shows that he was paid only $40,429 in that year, thus showing an underpayment in excess of 10,000 for 2001 alone

Respondent offered a letter dated November 6, 2000 into evidence, which states that Mr. Tyagi would be working less than full-time due to the pregnancy of his wife. However, as noted below, the underpayments began before November of 2001 and lasted for a year beyond November, 2001. In addition, if Mr. Tyagi's status changed to part-time, Respondent had an obligation to notify the Department of Labor and was made aware of that obligation when the I-129 application was approved. Therefore, I find that Respondent must pay $15,736.67 in back wages to Mr. Tyagi as detailed below.

| PAY PERIOD ENDING | REQUIRED WAGE | AMOUNT PAID | AMOUNT OWED |
|---|---|---|---|
| 10/06/00 | $1,957.69 | $1,384 | $573.69 |
| 10/20/00 | $1,957.69 | $1,092 | $865.69 |
| 10/28/00 | $1,957.69 | $1,254 | $703.69 |
| 11/11/00 & 11/25/00 | $1,957.69 | $1,154 | $803.69 x 2 = $1607.38 |
| 12/09/00 & 12/23/00 | $1,957.69 | $1,200 | $757.69 x 2 = $1515.38 |
| 01/07/01 | $1,957.69 | $1,504 | $453.69 |

| | | | |
|---|---|---|---|
| 01/21/01 | $1,957.69 | $1,650 | $215.38 |
| 02/18/01-04/29/01 (6 pay periods) | $1,957.69 | $1,850 | $107.69 x 6 pay periods = $646.14 |
| 05/13/01 | $1,957.69 | $1,725 | $232.59 |
| 05/27/01-12/22/01 (16 pay periods) | $1,957.69 | $1,400 | $557.69 x 16 pay periods = $8923.04 |
| **TOTAL OWED:** | | | $15,736.67 |

## IV. Conclusion

Based on the foregoing, I find that Respondent has violated the Act by failing to pay the H-1B nonimmigrant employees the required wage and by failing to offer the same benefits to H-1B nonimmigrant employees as it offers to its other employees.

## ORDER

It is hereby **ORDERED** that Respondent pay $78,597.25, which represents the amount of backwages owed to the H-1B nonimmigrant employees concerned and the $90 owed to Mr. Adhav for reimbursement of medical expenses.

A

**PAUL H. TEITLER**
Administrative Law Judge

Cherry Hill, New Jersey

**NOTICE OF APPEAL RIGHTS:** Pursuant to 20 C.F.R. §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, Francis 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.