American Law Institute- American Bar Association Seminar

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Pressing Immigration Law Issues in the Workplace - Why Should Immigration Law Interest or Alarm You?

Presented by:
Rajiv S. Khanna
Law Offices of Rajiv S. Khanna, PC
5225 N. Wilson Blvd
Arlington, VA 22205
(703) 908-4800
http:/www.immigration.com

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About the Presenter, Rajiv S. Khanna

Law Offices of Rajiv S. Khanna, PC
5225 N. Wilson Blvd
Arlington, VA 22205
(703) 908-4800

Rajiv is a member of the Virginia and DC Bars and the principle of the Law Offices of Rajiv S. Khanna, PC. Since 1993, he and his firm have focused their practice on employment and business-based immigration and related administrative and federal litigation. His Firm represents individuals and businesses from every major city in USA and internationally. Their immigration practice includes transactional work (immigration/visa petitions, etc.), compliance consultations, defending government audits and related litigation. The firm employs forty people and has offices in Arlington and Staunton in Virginia.

Rajiv has been providing educational seminars for over ten years with emphasis on practical approaches for compliance with immigration laws. The firm's web site http://www.immigration.com is the oldest portal and compendium of immigration law.

Rajiv's background includes corporate law, commercial law, constitutional law, business law, government contracts, private international law, and RICO and Antitrust litigation and litigation management. Because of this diversity, he possesses experience and insight from various disciplines that equips to provide a unique insight into immigration law as a multi-faceted discipline.

Outline Contents

Seminar Outline and Notes

INTENDED AUDIENCE

Why should immigration law interest or alarm you?

You are very likely, perhaps even certain to run into immigration issues if you are:

1. In-house counsel
2. University/education lawyer
3. M&A/Corporate Lawyer
4. Litigator
5. Labor/Employment Lawyer
6. Business lawyer or General Practitioner/contracts lawyer including government contracts lawyer
7. Part of a business/management team or HR of an organization

PURPOSE

The purpose of this seminar is to sensitize you and alert you to some of the more dangerous issues that we see in our practice. So we need to make sure you know what you do not know.

CAVEAT 1. Note that we are not covering aspects of immigration law that relate to criminal law.

CAVEAT 2. Of necessity, we will have to oversimplify many aspects of our discussion to make certain we meet our time constraints.

SUBSTANTIVE DISCUSSION

A. Levels of governance: Like all agency practice, we are governed at several levels:

1) US Constitution
2) Immigration and Nationality Act
3) Agency regulations
4) Agency adjudications
5) Standard Operating Procedures – unique to each agency and known by different names for different agencies
6) Policy memoranda — unfortunately, these often replace regulations. Practice conventions
7) Gray areas

B. Regulating agencies:

1) **US State Department (DOS)**: Their responsibility is to issue visas through consulates. Visas are a permission to enter USA.
http://travel.state.gov/

2) **Customs and Border Protection (CBP):**
Inspects incoming people.
http://www.cbp.gov/

3) **Immigration and Custom Enforcement (ICE):**
ICE is responsible for investigations and enforcement.
http://www.ice.gov/

4) **Citizenship and Immigration Services (CIS – previously, INS):**
Within the borders of USA, CIS is responsible for providing immigration benefits. **http://www.uscis.gov/portal/site/uscis**

5) **Department of Labor (DOL):** DOL is responsible for protecting the US workforce and related investigation and enforcement.
http://www.foreignlaborcert.doleta.gov/hiring.cfm

6) **Department of Justice (DOJ):** Responsible for ensuring compliance with immigration related discrimination laws.
http://www.usdoj.gov/crt/osc/

7) **The States – new players:** The latest trend is that States have started legislating on certain aspects of immigration law. See Attachment 1, press release announcing a lawsuit by DOJ against Illinois. So far, in the first six months of this year (2007), 41 states have voted 171 immigration bills into laws.

C. Can you get reliable information on immigration law directly from the government?

Usually, no, you cannot. Their public information functions are run by people untrained in law and often these functions are contracted out to private companies. Note that except for cases of affirmative misconduct, there exists no equitable estoppel against bad advice given by agency personnel. Your best bet for getting (semi-) reliable information is the agency's web site and the instructions on the pertinent forms. The information-disseminating function in agencies is often in the hands of non-lawyers or even worse, independent contractors.

If you do take information from a government web site, make sure you take a print out and date the information. This could serve as a defense against allegations of

willful violations.

D. Nonimmigrant Visa and Immigrant Visa Defined:

NIV is a visa that permits a person to visit and stay in USA for a specific purpose. From A to U visas there are several categories of visas.

An immigrant visa (also known as a "green card") gives an individual the right to live and work in USA permanently.

E. Immigration Rules in Hiring a "non-US" worker

Can you make an employee pay the legal fees and expenses?
The answer depends upon the type of benefit being sought. In many cases, like those of H-1 employees, the laws require employers to pay certain government fees. Additionally, the laws do not permit employers to take deductions from employees' wages. Note also that salary does not include benefits or bonuses. Please check with competent counsel.

Recruitment Advertising: In many cases, there exist special rules for advertising such as those for green card applications. There are also special rules for H-1B dependant employers.

I-9 compliance – watch out for discrimination
Bottom-line advice: read and follow the instructions on Form I-9.

Documentation requirements
When a nonimmigrant worker is hired, there are often some up-front documentation requirements. These requirements could be simple or extremely complicated. Visas like H-1 require extensive documentation maintenance. See the H-1 Compliance link in Section F below.

F. Immigration Rules in Maintaining Employment of a "Non-US" Worker

Documentation requirements
I-9's need to be maintained and updated for all workers and H-1 documentation needs to be maintained on an ongoing basis.

I-9 Links
CIS Link to I-9 Compliance

CIS Link ink to E-Verify – a program for online SSN verification.

DOJ Link – information on non-discriminatory practices

H-1 Compliance
DOL Link to H-1 Compliance

No substantial variation from what was described to the government/ amendments may be required: Once a job has been described (under penalty of perjury) to the government, employers are not permitted to change the job incidents (salary, description, etc.) without filing an amendment.

Movement of H-1 workers: General rule – do not assume you can move non-immigrant workers from place to place. There are some fairly intricate laws governing this. See the H-1 Compliance link in Section F above.

Vacation and benching of H-1 workers: Often, nonimmigrant workers cannot be placed in non-productive status. Again, there are strict rules that govern this area. See the H-1 Compliance link in Section F above. Also see Attachments 2-4, some decided cases from the DOL jurisprudence.

Liquidated damages may not be permitted: Beware; your normal employment contracts may be illegal in the H-1 world. What a reasonable attorney might consider liquidated damages could be considered an impermissible penalty by the government. See attached cases. See Attachment 2, Novinvest matter.

G. Immigration Rules in Termination of a "non-US" worker

One-way ticket back
For H-1 workers, the law requires that employer pay one way ticket back to the employee's home country, if the employer terminates the employee prior to the contemplated period of employment. This liability does not arise if the employee voluntarily resigns or changes status to another visa type. The liability covers only the employee – not his/her family.

Informing CIS – back wage liability
For most nonimmigrant workers, it would be a good idea to inform CIS about the termination. In H-1 workers' cases, if you do not inform CIS, the employment is considered not to have been terminated. So back wages can be and are awarded. See attachments 3-4, cases from DOL.

FURTHER NOTEWORTHY POINTS

H. Immigration law and corporate restructuring/M&A; don't take on old liabilities; unintentional assumption of liability.

I. You may be responsible for independent contractors: Normally an employer is responsible for their own workforce and are required to make sure they possess appropriate work authorizations. But as the infamous Wal-Mart investigation showed, employers can be hauled up for knowing employing independent contractors who employ illegal workers. See Attachment 5, a press release from ICE.

J. Consequences of immigration violations for government contractors: If your client is a government contractor, they may have a lot more to lose if they are found to have committed immigration violations. A little-known executive order has existed since the times of President Clinton that bars an immigration violator from federal contracting. See attached order and its extension to date by President Bush. See Attachments 6 and 7, executive orders from Pres. Clinton and Bush.

K. Common sense will get you into trouble:

1) **Litigating against the government:** – the Real ID Act prevents courts from looking at CIS discretionary actions unless there is an issue of US Constitution or law– beyond Chevron deference. See Attachment 9, excerpt from the relevant statute.

2) **Doctrine of consular non-reviewability:** Decisions made by US consulates are not reviewable by courts.

3) **No *Stare Decisis*** The doctrine of Stare Decisis does not apply in administrative decisions or even in many appellate decisions. See Attachment 8, a memo from CIS making it clear that they retain the authority to revisit extensions and amendments in existing cases de novo.

4) **Court decisions are not binding outside that court's jurisdiction.**

L. Defending audits and enforcement

1) **DOL** – The periods of limitation and investigation can range from one year to forever. Theoretically, there is no limitation in PERM and salary under-payment investigations

2) **DOJ** investigations for discrimination. cases can also lead to debarment and fines.

3) **DHS/ICE** investigations – The rue of thumb is to get criminal lawyers involved.

SUMMARY CONCLUSION

1) Don't assume you know the answer even if you know it. Immigration governance changes every day and the smallest change in facts can change the results.

2) Go to a competent immigration law practitioner. Get a written opinion or at least take contemporaneous notes.

QUESTION/ANSWERS

Attachment 1

"United" States of America?

Not quite "United" when it comes to immigration. On 24 September 2007, DOJ Sued Illinois. See attached press Release. Note that 41 States have immigration related laws today.

Department of Justice

FOR IMMEDIATE RELEASE **CIV**
MONDAY, SEPTEMBER 24, 2007 **(202) 514-2007**
WWW.USDOJ.GOV **TDD (202) 514-1888**

Justice Department Seeks to Invalidate Illinois Law Flouting Federal Immigration Efforts

WASHINGTON—The Department of Justice today filed a lawsuit in federal district court seeking to invalidate an Illinois state law that attempts to prevent employers from using DHS's E-Verify system, which allows them to check in real-time whether new hires are authorized to work in the United States. The lawsuit seeks a declaration that a law passed earlier this year by the Illinois legislature and signed by the Governor that prohibits employers from enrolling in the Department's E-Verify system is invalid.

"E-verify or the Basic Pilot Program, authorized by Congress, is the on-line system that allows employers to verify whether new hires are allowed to work in the United States," said Carl Nichols, Deputy Assistant Attorney General for the Justice Department's Civil Division. "Today's lawsuit seeks to invalidate an Illinois state law that frustrates our ability to assist employers in making sure their workforce is legal, and in doing so conflicts with federal law."

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Attachment 2

For H-1B workers, liquidated damages provisions could easily be viewed as impermissible early termination penalties.
Administrator, Wage & Hour Division, USDOL v. Novinvest, LLC
ARB No. 03-060, ALJ No. 2002-LCA-24 (ARB July 30, 2004)

***Administrator, Wage & Hour Division, USDOL v. Novinvest, LLC*, ARB No. 03-060, ALJ No. 2002-LCA-24 (ARB July 30, 2004)**

ARB CASE NO. 03-060
ALJ CASE NO. 02-LCA-24
DATE: July 30, 2004
In the Matter of:
ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
PLAINTIFF,
v.
NOVINVEST, LLC,
BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act, as amended (INA), 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2004), and regulations at 20 C.F.R. Part 655 (2003). Novinvest LLC (Novinvest) petitions for review of a Decision and Order (D. & O.) issued by the Administrative Law Judge (ALJ) on January 21, 2003. Novinvest is a corporation that engages in computer consulting and employs nonimmigrant alien computer programmer analysts. The ALJ found that Novinvest was liable for back wages to nonimmigrant workers, including an "investment fee" imposed against three of these workers. We modify the decision of the ALJ as explained below.

Jurisdiction and Standard of Review

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

[Page 2]

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

Regulatory Framework

The INA permits employers to employ nonimmigrant alien workers in specialty occupations in the United States. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b) (H-1B nonimmigrants). Specialty occupations are occupations that require "theoretical and practical application of a body of highly specialized knowledge, and . . . attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for

entry into the occupation in the United States." 8 U.S.C.A. § 1184(i)(1). In order to be eligible for employment in the United States, these workers must receive H-1B visas from the State Department upon approval by the Immigration and Naturalization Service. 20 C.F.R. § 655.705(b). The employer concomitantly must obtain certification from the United States Department of Labor after filing a Labor Condition Application (LCA). 8 U.S.C.A. § 1182(n). The LCA must stipulate the wage levels and working conditions for the H-1B employees. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 655.732. Deductions from wages expressly *not* authorized under the regulations include "a penalty paid by the H-1B nonimmigrant for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer." 20 C.F.R. § 655.731(c)(10)(i). *See generally* D. & O. at 12-15, 20-21.

Issue

Did the ALJ correctly determine that Novinvest is liable for the $5,000 deduction from the salaries of its H-1B nonimmigrant employees and must compensate each worker for judgment amounts assessed?

Background

The ALJ has set forth the facts of the case in detail (D. & O. at 2-12), and we will not revisit them in their entirety. We limit our focus to the issue upon which Novinvest petitions for review. *See* Novinvest LLC Petition to Review the Decision and Order dated February 18, 2003; 20 C.F.R. § 655.845(b)(3) and (4) (petition for ARB review must specify issues giving rise to petition and state specific reasons why petitioning party believes ALJ decision is in error).

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Novinvest provides computer specialists "on a project basis to client companies." Prosecuting Party's Exhibit (PX) 5 at 1. Novinvest employed H-1B nonimmigrant "specialists" after it filed an LCA with the Department of Labor and after the Department of State, upon approval of the Immigration and Naturalization Service, issued the employees H-1B visas. The employees at issue for our purposes are Philip Peshin, Alex Koloskov, and Igor Viazovoi.[1]

Pursuant to an employment agreement, Novinvest required each of its employees to assume liability for a $5,000 investment fee. Captioned "Relocation Assistance," this provision of the agreement stated:

The Company invests considerable time, effort and financial resources in organizing, assisting and transitioning the Employee to life in the US. The value of the Company's up-front investment (in order to hire, process and train Employee) is estimated as USD 5,000 (five thousand) per Employee. This investment is considered an interest-free loan from the Company to the Employee starting on the day employee arrives in the US. Every month, 1/12 (one twelfth) of the amount is forgiven by the Company, so that at the end of the Employee's first year with the Company the entire amount is forgiven. If the Employee leaves the Company's employment, for any reason, before the end of one year, or is terminated, the remaining balance becomes due, and the Employee must reimburse the Company.

PX 5 at 5. The employees never actually received $5,000, and Novinvest was unable to document expenditures of $5,000 for each employee. D. & O. at 5-6 (Stipulation No. 20,

Finding of Fact No. 4). All three employees resigned from Novinvest prior to their one-year anniversary date.

After a hearing, the ALJ found that the $5,000 investment fee constituted an impermissible early termination penalty and that Novinvest violated its wage obligations under the INA and implementing regulations by charging the H-1B workers the $5,000 penalty.[2] D. & O. at 19-22; 20 C.F.R. § 655.731(c)(10)(i); 20 C.F.R. §655.731(c)(11). The ALJ found Novinvest liable for the following amounts in compensation for the penalty: Peshin was due $5,000, Koloskov was due $2,347.52, and Viazovoi was due $1666.67. D. & O. at 22.

Novinvest had secured state court judgments against the respective employees, which included the $5,000 investment fee. D. & O. at 7-9 (Findings of Fact Nos. 7, 16, 21). The judgments against Peshin, Koloskov, and Viazovoi totaled $8,789.45, $2,347.52, and $1,666.66, respectively. Peshin paid none of his judgment, Koloskov paid $1,200 of his judgment, and Viazovoi paid $55 of his judgment. *Id.*

Discussion

In its petition for review, Novinvest argues that the ALJ erred in calculating the amounts owed to the three employees. First, according to Novinvest, the ALJ arbitrarily attributed the amounts awarded in the judgments against Koloskov and Viazovoi exclusively to the impermissible penalty when Novinvest presumably had asserted other claims. As evidence, Novinvest cites the $8,683.38 claim against Koloskov for which it received an award of only $2,347.52 and the $8,487.00 claim against Viazovoi for which it received an award of only $1,666.66. Second, according to Novinvest, "the amounts assessed to Novinvest should not exceed the amounts actually paid by the three individuals toward the satisfaction of Novinvest's judgments." Petition at 1. In other words, Peshin should receive nothing, Koloskov should receive $1,200, and Viazovoi should receive $55.

[Page 4]

The INA and its implementing regulations expressly prohibit early termination penalties. Specifically, it is a violation of the INA

for an employer who has filed an application under this subsection to require an H-1B nonimmigrant to pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer. The Secretary shall determine whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law.

8 U.S.C.A. § 1182(n)(2)(C)(vi)(I). *See* 20 C.F.R. § 655.731(c)(10)(i) ("[a] deduction from or reduction in the payment of the required wage is not authorized (and therefore is prohibited)" for purposes of "[a] penalty paid by the H-1B nonimmigrant for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer"). The ALJ found that Novinvest violated the INA when it assessed the "investment fee" penalties (D. & O. at 19-22), and Novinvest has not appealed this aspect of the ALJ's decision. We find, therefore, that Novinvest is not entitled to recover from the nonimmigrants *any* of the $5,000 investment fees. We disagree with the ALJ, however, with respect to the back wage calculations. The ALJ determined that Novinvest owed each of the workers the full amount of the judgments assessed. We find instead that Novinvest is required to refund to Peshin, Koloskov, and Viazovoi monies actually paid

by them as compensation for the investment fee penalty. Any fees or costs associated with collection of monies pursuant to that provision also must be refunded. We note that the Secretary is authorized to impose administrative remedies, including civil money penalties, for willful failure to meet a condition of an attestation or a willful misrepresentation of material fact in an attestation. *See* 8 U.S.C.A. § 1182(n)(2)(C); 20 C.F.R. § 655.810. Therefore, Noinvest may be subject to additional action by the Secretary if it engages in further efforts to obtain penalty provision funds.

Conclusion

Noinvest is not entitled to recover any amounts under the "Relocation Assistance" provision of its contracts with the H-1B nonimmigrant employees. The decision of the ALJ hereby is **MODIFIED** to order repayment of amounts paid by the nonimmigrants to Novinvest pursuant to the "Relocation Assistance" provision of the employment agreement, including any fees or costs in connection therewith.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge
OLIVER M. TRANSUE
Administrative Appeals Judge

[ENDNOTES]

[1] These H-1B nonimmigrants, in addition to another nonimmigrant, Igor Politykin, arrived in the United States between March 2000 and April 2001. They arrived prepared to work, but Novinvest "benched" them and refused to pay them in violation of the INA. *See* 8 U.S.C.A. § 1182(n)(1)(A); 8 U.S.C.A. § 1182(n)(2)(C)(vii); 20 C.F.R. § 655.731(c)(7)(i) (if the H-1B nonimmigrant is not performing work and is nonproductive due to a decision by the employer (*e.g.,* due to lack of work) the employer is required to pay him at the wage listed in the LCA). After an investigation, the Administrator determined that Novinvest owed these employees back wages for benching periods during the course of employment. The ALJ upheld the Administrator's determination as well as the back wage calculations. D. & O. at 15-17. Novinvest did not appeal these findings.

[2] The Administrator's determination letter did not allege specifically that the "investment fee" requirement violated the INA, stating merely that Novinvest had "failed to pay wages as required." PX 29 at 1. The Administrator subsequently moved to conform the determination letter to the evidence to include allegations pertaining to the investment fee. Hearing Transcript at 129-131. The ALJ granted the motion, finding the early termination penalty issue properly before him. D. & O. at 18-19. Novinvest did not appeal this finding.

Attachment 3

If an employer terminates the employment of an H-1 worker, unless they formally notify INS (CIS), they are liable to pay the wages of the worker – even if they have informed the worker of the termination. This case has several other interesting issues such as when does the liability to pay wages begin.

Neeraja Rajan
v.
International Business Solutions, Ltd.
ARB (Administrative Review Board) CASE NO. 03-104
ALJ CASE NO. 03-LCA-12
August 31, 2004

IN THE MATTER OF: NEERAJA RAJAN, COMPLAINANT
v.
INTERNATIONAL BUSINESS SOLUTIONS, LTD., RESPONDENT
ARB CASE NO. 03-104
ALJ CASE NO. 03-LCA-12
August 31, 2004

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act, as amended (INA), 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2004), and regulations at 20 C.F.R. Part 655, Subparts H and I (2004). Prosecuting Party Neeraja Rajan, an H-1B nonimmigrant computer programmer analyst, filed a complaint under the INA against her employer, Respondent International Business Solutions, Ltd (IBS), an information technology company. Ms. Rajan's spouse, Rajan Ramaseshan, acted as her representative. IBS now petitions for review of a Decision and Order (D. & O.) an Administrative Law Judge (ALJ) issued on April 30, 2003. The ALJ upheld Ms. Rajan's complaint. We modify the decision of the ALJ as explained below.

JURISDICTION AND STANDARD OFS REVIEW

The Administrative Review Board (ARB) has jurisdiction to review the ALJ's decision under 8 U.S.C.A. § 1182(n)(2) and 20 C.F.R. § 655.845. See Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).
Under the Administrative Procedure Act, the Board, as the designee of the Secretary of Labor, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996), quoted in Goldstein v. Ebasco Constructors, Inc., 1986-ERA-36, slip op. at 19 (Sec'y Apr. 7, 1992). The Board engages in de novo review of the ALJ's decision. Yano Enterprises, Inc. v. Administrator, ARB No. 01-050, ALJ No. 2001-LCA-0001, slip op. at 3 (ARB Sept. 26, 2001); Administrator v. Jackson, ARB No. 00-068, ALJ No. 1999-LCA-0004, slip op. at 3 (ARB Apr. 30, 2001). See generally Mattes v. United States Dep't of Agriculture, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (rejecting argument that higher level administrative official was bound by ALJ's decision); McCann v. Califano, 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's decision by higher level administrative review body).

REGULATORY FRAMEWORK

The INA permits employers to employ nonimmigrant alien workers in specialty occupations in the United States. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b). These workers are commonly referred to as H-1B nonimmigrants. Specialty occupations are occupations that require "theoretical and practical application of a body of highly specialized knowledge, and . . . attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C.A. § 1184(i)(1). In order to employ H-1B nonimmigrants, the employer must

obtain certification from the United States Department of Labor after filing a Labor Condition Application (LCA). 8 U.S.C.A. § 1182(n). The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrants. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 655.732. After it secures the LCA, the employer petitions for and nonimmigrants may receive H-1B visas from the State Department upon approval by the Immigration and Naturalization Service (INS). 20 C.F.R. § 655.705(b). An employer violates the INA if, for employment-related reasons, it fails to pay an H-1B nonimmigrant who is in "nonproductive status." Employment-related nonproductive status results from factors such as lack of available work for the nonimmigrant or a nonimmigrant's lack of a permit or license. 8 U.S.C.A. § 1182(n)(2)(C)(vii); 20 C.F.R. § 655.731(c)(7). Furthermore, an employer violates the INA when it deducts from a nonimmigrant's wages filing fees that INS collects from the employer to process the H-1B petition. 8 U.S.C.A. § 1182(n)(2)(C)(vi)(II); 20 C.F.R. § 655.731(c)(10)(ii).

ISSUES

*2 Did the ALJ correctly conclude that IBS violated the INA by failing to pay Ms. Rajan wages that it agreed to pay under the LCA?
Did the ALJ correctly conclude that IBS violated the INA by requiring Ms. Rajan to pay a filing fee associated with the H-1B petition?
Should IBS pay a civil money penalty if it required Ms. Rajan to pay the filing fee?
BACKGROUND

The ALJ has set forth the facts of the case in detail with citation to the case record. D. & O. at 2-5. Briefly, IBS engaged Ms. Rajan in a specialty occupation on an H-1B visa after securing authorization through an LCA. [FN1] IBS subsequently discharged Ms. Rajan after it failed to compensate her while in nonproductive status. Ms. Rajan complained to the U.S. Department of Labor's Wage and Hour Division, Employment Standards Administration, seeking back wages and reimbursement of $1,500 she paid to IBS, at its request, for the filing fee. After investigation, the Administrator found that IBS had violated the INA by failing to post notice of the LCA and failing properly to establish the prevailing wage rate. Prosecuting Party's Exhibit (PPX) 17. [FN2] The Administrator did not make findings regarding Ms. Rajan's complaint that IBS failed to pay her wages and charged her for the filing fee. Ms. Rajan then requested a hearing before an ALJ who found that IBS violated the INA by failing to compensate her while in nonproductive status (D. & O. at 5-9) and by assessing her money to pay the H-1B filing fee (id. at 9-11). See 8 U.S.C.A. §§ 1182(n)(2)(vi)(II), 1182(n)(2)(vii)(I); 20 C.F.R. § 655.731. The ALJ accordingly ordered IBS to pay Ms. Rajan back wages and to reimburse her for the money she had paid IBS for the fee. The ALJ remanded the case to the Administrator to determine whether to impose a civil money penalty for the filing fee violation. IBS petitioned for review of the ALJ's decision, raising numerous issues. See Respondent's Petition for Review (Petition) dated May 22, 2003. We address each issue in turn.

DISCUSSION

1. Notice of Complaint

IBS argues that the ALJ erred by permitting Ms. Rajan to allege violations, for purposes of the hearing, that were not part of the Administrator's findings. Petition at 3 (Issue 1). The Administrator is not a party to the proceeding, nor has he participated as amicus curiae. 20 C.F.R. § 655.820(b)(1).

We have examined the record, and we fail to discern any procedural irregularities that would require reversal of the ALJ's decision. The record shows that the Wage and Hour Division documented Ms. Rajan's complaint on October 31, 2001, on ESA Form WH-4, the alleged violations being: "Employer failed to pay H-1B worker(s) for time off due to a decision by the employer (e.g., for lack of work)" and "Employer required H-1B worker(s) to pay all or any part of $500/$1000 filing fee." This documentation comports with the requirements of 20 C.F.R. § 655.806 that the complaint be written or, if oral, that the Wage and Hour official who receives the complaint reduce it to writing.

*3 An applicable regulation states further that "[t]he Administrator, through investigation, shall determine whether an H-1B employer has [violated the INA]" and lists 16 separate classifications of violation, including those raised in Ms. Rajan's complaint. See 20 C.F.R. § 655.805(a). Here, the Administrator found violations other than those alleged by Ms. Rajan. Under the regulations, "[t]he complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that there is no basis for a finding that an employer has committed violation(s)." 20 C.F.R. § 655.820(b)(1). Therefore, Ms. Rajan appropriately requested a hearing because the determination "[was] not all encompassing - in that it left out the violations that [the Rajans] believe[d] [had] been committed by the employer (IBS) on regulations that govern wages needed to be paid to a H-1B specialty worker." Request for Hearing dated January 10, 2003, at 1. She then described the violations specifically (id. at 1-2) and documented evidence supporting findings of violation. Id. at 2-4.

The ALJ assigned to hear the case scheduled a hearing for February 24, 2003, issuing a notice of hearing and pre-hearing order on January 17, 2003. Counsel for IBS requested clarification of the issues. The ALJ addressed the issues during a February 13, 2003 conference call with the parties. The ALJ is authorized to conduct these procedures under 29 C.F.R. § 18.29. In short, the ALJ accorded IBS notice of the issues and an opportunity to defend. Counsel for IBS filed a pre-hearing submission dated February 14 in which he listed failure to compensate Ms. Rajan when in nonproductive status and IBS's request for and receipt of the H-1B filing fee as issues.

2. Motion for Continuance

IBS argues further that the ALJ erred by failing to continue the hearing to permit it to subpoena the Wage and Hour Division investigator and his investigation file. Petition at 3-4 (Issues 2 and 3). IBS represents that it "had initiated the steps necessary to have the ALJ issue a subpoena for the Investigator's testimony, but was unable to have it served prior to the hearing." Respondent's Brief at 24.

The record contains no written application for subpoenas or other evidence suggesting that the ALJ issued subpoenas. See 29 C.F.R. § 18.24(a). Indeed, it contains no reference to subpoenas whatever. The ALJ's Order issued following the February 13, 2003

conference call states merely that IBS's counsel requested a 45-day continuance of the hearing. Ms. Rajan objected to a continuance, and the ALJ denied the motion, citing 8 U.S.C.A. § 1182(n) and 20 C.F.R. § 655.835(c). [FN3] We conclude that the ALJ did not abuse his discretion by denying IBS's motion. 29 C.F.R. § 18.28 (continuances granted only in cases of prior judicial commitments, undue hardship, or other good cause). See Robinson v. Martin Marietta Serv., ARB No. 96-075, ALJ No. 94-TSC-7, slip op. at 4 (ARB Sept. 23, 1996); Malpass & Lewis v. General Elec. Co., 1985-ERA-38/39, slip op. at 6-11 (Sec'y Mar. 1, 1994).

3. Representation

*4 IBS charges that the ALJ erred by permitting Mr. Rajan, a non-attorney and H-1B nonimmigrant alien, to represent his wife during the proceeding. Petition at 4 (Issue 4). IBS argues that Mr. Rajan is not qualified because he is not a United States citizen. IBS first requested Mr. Rajan's disqualification during the February 13, 2003 conference call, and the ALJ issued an Order disqualifying Mr. Rajan on February 14. Mr. Rajan requested reconsideration on February 18. The ALJ granted reconsideration and, on February 21, issued an order permitting him to represent Ms. Rajan. The hearing convened on February 24, 2003.

In addressing the representation of parties, the rules of practice and procedure for the Department of Labor Office of Administrative Law Judges provide that "[a]ny party shall have the right to appear at a hearing in person, by counsel, or by other representative . . . ." 29 C.F.R. § 18.34(a). The rules set out qualifications for attorneys, 29 C.F.R. § 18.34(g)(1); and, for "persons not attorneys," specify that "[a]ny citizen of the United States who is not an attorney at law shall be admitted to appear in a representative capacity in an adjudicative proceeding." 29 C.F.R. § 18.34(g)(2). Thus, any non-attorney who is a U.S. citizen "shall" be allowed to represent a party. As Ms. Rajan argues, however, the regulation does not foreclose an ALJ from permitting a non-citizen, non-attorney representational privileges. [FN4] See 29 C.F.R. § 18.29 (authority of ALJ to conduct fair and impartial hearings).

Conversely, the rules authorize an ALJ to deny a person the privilege to appear in a representative capacity. In particular, "[t]he administrative law judge may deny the privilege of appearing to any person, within applicable statutory constraints, e.g. 5 U.S.C. 555, who he or she finds after notice of and opportunity for hearing in the matter does not possess the requisite qualifications to represent others; or is lacking in character or integrity; has engaged in unethical or improper professional conduct; or has engaged in an act involving moral turpitude." 29 C.F.R. § 18.34(g)(3). The regulations thus expressly permit ALJs latitude in terms of whom they will permit to represent a party. Consequently, while regulatory section 18.34(g)(2) provides that any non-attorney U.S. citizen "shall be admitted" to represent a party, the ALJ "may" deny the privilege in certain circumstances.

The ALJ ultimately recognized Mr. Rajan as the authorized representative of Ms. Rajan in part because the intent of the regulation "is not to negate the ability of spouses to represent each other in administrative proceedings." Order Granting Reconsideration issued February 21, 2003, at 1. After acknowledging Ms. Rajan's statement that she was 35 weeks pregnant, the ALJ stated: "Due to the fact that the Prosecuting Party will be in a

delicate state of health in this matter, assistance by her spouse is uniquely warranted, despite his citizenship status." Id. The ALJ cited Mr. Rajan's "extensive educational background" as supporting "the determination that he is qualified to participate in this matter on behalf of his wife." Id. [FN5] The ALJ reiterated his ruling at the hearing. Hearing Transcript (T.) at 5-6. We find that the ALJ did not err in authorizing Mr. Rajan's representation and that, in any event, IBS has failed to demonstrate prejudice.

3. Credibility Findings

*5 IBS alleges that Ms. Rajan was not credible. Petition at 4 (Issue 5). The ALJ credited her testimony, however, and discredited testimony that IBS technical director John Ayyachamy and IBS program analyst Ashish Dua gave.

Ms. Rajan testified that she reported to work in person at the IBS offices on April 4, 2001, and spoke with IBS human resources contact Sophia Samuel. Samuel informed her that although IBS had no job assignment for her currently, it would circulate her resume to clients and that she similarly should conduct a job search, referring any prospective clients to IBS to negotiate for her services. T. 101-107, 119. That Ms. Rajan did so is evidenced by numerous e-mails dated between April and November 2001. PPX 24-35. Ms. Rajan also testified that she contacted IBS every three or four days to check on job possibilities. T. 103-104. Samuel, who was her chief contact at IBS, did not testify. Ms. Rajan also maintained contact with an IBS recruiter. T. 126; PPX 22, 23. On two occasions, April 10 and May 18, 2001, Ms. Rajan sent updated resumes to IBS. PPX 22, 23. She continued to send her resume to potential clients for referral to IBS. T. 116-118.

In contrast, Ayyachamy testified that he was unaware that Ms. Rajan had reported for work. T. 145. Ayyachamy and Dua testified that they attempted unsuccessfully to contact Ms. Rajan by telephone in May or June 2001 to offer her an in-house employment project. T. 136-137, 184, 217-218. Ms. Rajan testified that she was not aware that IBS had attempted contact. T. 122.

The ALJ found that the record did not support the testimony of Ayyachamy and Dua, in particular their testimony that Ms. Rajan was not ready, willing, and able to work for IBS (T. 145, 250; EX G). D. & O. at 6. The ALJ found credible Ms. Rajan's testimony that she reported to work on April 4, 2001, noting that the record demonstrated that lack of work prevented IBS from assigning her a project. See, e.g., Dua's e-mail in which he stated that "the market conditions are bad so we don't need really to rush" Ms. Rajan's employment. EX K at 1. The ALJ found unbelievable that Ms. Rajan "desired to live without an income during the time period relevant here, and would jeopardize her nonimmigrant status by not being able and ready for employment by [IBS]." D. & O. at 6. As evidence, the ALJ cited PPX 14, her "rather frantic" appeal to INS when she discovered that IBS had requested INS to withdraw her LCA. Id. The ALJ also found it unreasonable that Dua would not have attempted to contact Ms. Rajan by e-mail since they had communicated by that means previously (EX H, I, J, K; PPX 22, 23). D. & O. at 7. We agree with the rationale for these findings, and we adopt them.

4. Nonpayment of Wages

IBS argues that it was not required to pay Ms. Rajan wages because she abandoned her employment and thus was nonproductive voluntarily. Petition at 4 (Issue 6). With regard to an H-1B nonimmigrant, who is employed but not working, the regulations provide for circumstances where wages must be paid and circumstances where wages need not be paid. Specifically, if the H-1B nonimmigrant is not performing work and thus is in a nonproductive status because of lack of assigned work, lack of a permit or license, or some other employment-related reason, the employer is required to pay the wages due under the LCA. 8 U.S.C.A. § 1182(n)(2)(C)(vii); 20 C.F.R. § 655.731(c)(7)(i).
*6 An employer need not pay wages, however, to H-1B nonimmigrants in nonproductive status due to conditions unrelated to employment which remove the nonimmigrants from their duties at their "voluntary request and convenience" or which render them unable to work. 20 C.F.R. § 655.731(c)(7)(ii). Examples of these conditions include touring the United States, caring for a relative who is ill, maternity leave, or a temporarily incapacitating accident. Id.
Here, Ms. Rajan's H-1B visa became valid on January 24, 2001. She departed the United States for India on February 6, 2001, however, in order to undergo surgery there. EX K. [FN6] After recovering from the surgery, she returned to the United States on April 2 and reported for work at IBS on April 4. IBS did not assign her work on that date or thereafter. The ALJ found that Ms. Rajan desired work with IBS and, after reporting on April 4, 2001, made considerable effort to secure it. The ALJ is correct that on April 4 Ms. Rajan's status changed from voluntarily nonproductive to nonproductive because of lack of assigned work. D. & O. at 6-7. Accordingly, we find that Ms. Rajan did not abandon her employment with IBS and is due back wages.

5. Back Wage Recovery

IBS argues that the ALJ erred in determining the beginning and end dates for Ms. Rajan's back wage award. Petition at 4 (Issues 7 and 8). The applicable provisions are 8 U.S.C.A. § 1182(n)(2)(C)(vii) and 20 C.F.R. § 655.731(c)(6) and (7)(ii). See generally 65 Fed. Reg. 80,110, 80,169-80,175 (Dec. 20, 2000) (H-1B interim final rule).
The ALJ determined that IBS's back wage liability commenced on the date that Ms. Rajan "enter[ed] into employment" with IBS. 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I). Regulatory section 655.731(c)(6)(i) specifies that the date the H-1B nonimmigrant is considered to "enter into employment" means the date that the nonimmigrant "makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter." The ALJ found the "entered into employment" date to be April 4, 2001, when Ms. Rajan reported for work at IBS after returning from India. IBS argues that its back wage liability commenced 60 days after April 4, 2001. It relies on 20 C.F.R. § 655.731(c)(6)(ii) for its argument. Although this regulation pertains to Ms. Rajan's circumstances, IBS has construed it incorrectly. Regulatory section 655.731(c)(6)(ii) refers to a period "beginning 60 days after the date the nonimmigrant becomes eligible to work for the employer" in the case of a nonimmigrant present in the United States, as was Ms. Rajan, on the date that INS approved the H-1B petition. The regulation provides further that the H-1B nonimmigrant is considered to be "eligible to

work for the employer" upon the date of the employer's "need" set forth on the H-1B petition, or the date of adjustment of the nonimmigrant's status by INS, whichever is later. Here the date of need was December 15, 2000. Employer's Exhibit (EX) A at 12. Ms. Rajan's H-1B classification is listed as valid beginning January 24, 2001. EX B. The date of status adjustment (January 24, 2001) consequently post-dated the date of need (December 15, 2000), and any 60- day period had expired by the time Ms. Rajan entered into employment on April 4, 2001.

*7 As for the end date of the back wage period, IBS argues that it discharged Ms. Rajan by letter dated September 14, 2001. Addressed to Ms. Rajan at an outdated address and signed by IBS human resources manager Sophia Samuel, the letter stated: "This is to notify you that IBS has cancelled your H1 B as of 17th September, 2001. Wish you Good Luck!!!" EX E. IBS notified INS of the discharge by letter dated September 28. Addressed to INS's Eastern Service Center and signed by Samuel, the letter stated with reference to Ms. Rajan: "The following candidate is not with International Business Solutions, Ltd. as of September 15, 2001." EX D.

Ms. Rajan testified that she never received the September 14 letter and became aware of her discharge during a telephone conversation with Samuel on October 30, 2001. The ALJ found that the back wage liability ended on January 3, 2002, the date of the letter sent by INS notifying IBS that INS had revoked Ms. Rajan's petition. The INS letter stated in relevant part: "It has now come to the attention of this Service that the beneficiary [Ms. Rajan] is no longer employed by you and you wish to withdraw your petition in behalf of the beneficiary. Therefore the approval of your petition is automatically revoked in accordance with 8 C.F.R. 214.2." EX F.

We disagree with the ALJ on this issue and find instead that the period of back wage liability ended on September 28, 2001, the date that IBS notified INS of Ms. Rajan's discharge. This finding comports with regulatory language. See 20 C.F.R. § 655.731(c)(7)(ii). The applicable portion of this regulation consists of two sentences. The first sentence states that payment of wages "need not be made if there has been a bona fide termination of the employment relationship." The second sentence states: "INS regulations require the employer to notify the INS that the employment relationship has been terminated so that the petition is canceled (8 C.F.R. 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 C.F.R. 214.2(h)(4)(iii)(E))." The applicable INS regulation provides for "automatic revocation" of a petition, specifically: "The approval of any petition is automatically revoked if the petitioner goes out of business or files a written withdrawal of the petition." 8 C.F.R. § 214.2(h)(11)(ii) (2002). Under these regulations, the date of bona fide termination would be September 28, 2001, when IBS notified INS that it no longer employed Ms. Rajan and approval of the petition was revoked automatically. We accordingly adjust the ALJ's back wage award (D. & O. at 9) to reflect 25 weeks and three days or 12 bi-weekly pay periods and eight days. The computation follows: [12 x $1,480.77 = $17,769.24] + [8 x $148.64 = $1,184.64] = $18, 953.88.

6. Filing Fee

Finally, IBS charges that the ALJ erred by remanding the case to the Administrator for penalty assessment. While IBS conceivably could be questioning the ALJ's authority to

remand the case (See Petition at 5 (Issue 9), IBS's brief makes clear that the challenge is to the ALJ's finding that IBS violated the INA prohibition against deducting the H-1B filing fee from the wages of a nonimmigrant. Respondent's Brief at 27-28. See 8 U.S.C.A. § 1182(n)(2)(C)(vi)(II); 20 C.F.R. § 655.731(c)(10)(ii). We discern no merit to this argument. The INA and implementing regulations prohibit employers from receiving and nonimmigrants from paying any part of the $500/$1,000 filing fee. The record establishes that Ms. Rajan paid IBS $1,500 for "H-1B processing" at the request of IBS. [FN7] PPX 10. Overwhelming evidence supports the ALJ's findings in this regard. D. & O. at 9-11. We accordingly adopt them. Furthermore, the INA permits the Secretary to impose a civil money penalty of $1,000 for each such violation. 8 U.S.C.A. § 1182(n)(2)(C)(vi)(III). As delegate of the Secretary, see supra, we assess a penalty of $1,000 against IBS.

CONCLUSION

*8 IBS violated the INA when it did not pay Ms. Rajan wages while in nonproductive status due to lack of work and when it required Ms. Rajan to pay it $1,500 associated with an H-1B petition filing fee. The decision of the ALJ hereby is MODIFIED to order payment to Ms. Rajan of back wages for the period April 4, 2001, through September 28, 2001, in the amount of $18,953.88. IBS is also ordered to reimburse Ms. Rajan for her payment of $1,500. Additionally, IBS is assessed a civil money penalty of $1,000.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

FN1. Between 1993 and 1999 Ms. Rajan worked in India and the United States as a Systems Analyst and Programmer. Her most recent experience was as a Technical Analyst for American Express between January 1998 and December 1999. She holds a Bachelor of Science Degree with a dual concentration in Computer Science and Electronic Engineering. See Prosecuting Party's Exhibit (PPX) 8; Employer's Exhibits (EX) A and L.

FN2. The Administrator's determination lists violations of 20 C.F.R. §§ 655.731, 655.734, 655.805(a)(5), and 655.805(a)(16).

FN3. The regulation states: "The date of the hearing shall not be more than 60 calendar days from the date of the Administrator's determination. Because of the time constraints imposed by the INA, no request for postponement shall be granted except for compelling reasons. Even where such reasons are shown, no request for postponement of the hearing beyond the 60-day deadline shall be granted except by consent of all the parties to the proceeding." The hearing in this case convened on February 24, 2003, which was 59 days from the date of the Administrator's determination. Order issued February 14, 2003, at 2.

FN4. The Rajans stated: "Further, we contend that though the regulations (29 C.F.R. § 18.34(g)(2)) speak only to a United States citizen, they do not 'negate' the possibility of a non-U.S. citizen, non-attorney, representing another party in adjudicated court proceeding of this nature. Especially so, if an application is submitted by such a person (non-attorney, non-U.S. citizen) to the Chief Administrative Law Judge before the proceeding." Motion for Reconsideration at 2. See 29 C.F.R. § 18.34(g)(2) (procedure for approval). The Rajans complied with this procedure.

FN5. Mr. Rajan possesses three Masters Degrees in Business and Management from institutions in the United States and India.

FN6. Mr. Rajan apprised IBS of his wife's plans and progress on several occasions, and Dua assented to her delay in commencing work (EX H, I, K). D. & O. at 5-6.

FN7. The record also establishes that IBS paid INS only $610 for this fee. T. 151-152; EX A.
2004 WL 1955435 (DOL Adm.Rev.Bd)
END OF DOCUMENT

Attachment 4

In this case, employer tried to get around the obligation to pay wages by allegedly firing workers when no projects were available and then rehiring them when needed. ARB refused to allow that device. Rejected also were arguments that some of the workers were not authorized by employer to come to USA, and some workers took voluntary leaves of absence. It was also held that even workers who did not testify were entitled to back wages, because a "pattern and practice" of underpayment can be deduced from evidence. The strangest element of this case is that two workers (Jain and Mukunda) who did not want to get paid were awarded back wages, any way. Go figure.

In The Matter Of: United States Department Of Labor, Administrator,
Wage & Hour Division, Employment Standards Administration
v.
Pegasus Consulting Group, Inc.
ARB (Administrative Review Board) CASE NOS. 03-032, 03-033
ALJ CASE NO. 2001-LCA-29
June 30, 2005

IN THE MATTER OF: UNITED STATES DEPARTMENT OF LABOR, ADMINISTRATOR,
WAGE & HOUR DIVISION, EMPLOYMENT STANDARDS ADMINISTRATION, PROSECUTING PARTY
v.
PEGASUS CONSULTING GROUP, INC., RESPONDENT
ARB CASE NOS. 03-032, 03-033
ALJ CASE NO. 2001-LCA-29
June 30, 2005

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This matter arises under the Immigration and Nationality Act (INA or Act) H-1B visa program, 8 U.S.C.A. § 1101(a)(15)(H)(i)(b) (West 2005) and § 1182(n) (West 2005), which permits employers to employ non-immigrants to fill specialized jobs in the United States. Under review is the decision of a Department of Labor (DOL) Administrative Law Judge (ALJ) concluding that 14 of 19 Pegasus Consulting Group (Pegasus) computer programmer/analysts were underpaid under the H-1B programs and assessing civil penalties. The Wage and Hour Division (WHD) of the DOL and Pegasus have filed petitions for review. As we discuss, we affirm in part and reverse in part.
BACKGROUND

Under the H-1B program, an employer seeking to hire an alien must submit a Labor Condition Application (LCA) to the DOL. In the LCA, the employer attests that it will pay the H-1B worker "the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question" or "the prevailing wage level for the occupational classification in the area of employment, whichever is greater . . . . " 8 U.S.C.A. § 1182(n)(1)(A)(i)(I)-(II) (West 2005). After the DOL certifies the LCA, the United States Citizenship and Immigration Services (USCIS), known at the time as the Immigration and Naturalization Service (INS), may approve the H-1B petition seeking to employ the non-immigrant worker. § 1101(a)(15)(H)(i)(b). When a non-immigrant enters into employment, it is a failure to meet the condition of § 1182(n)(1)(A) for the employer to fail to pay full-time wages to an employee in non-productive status based on lack of work or the non-immigrant's lack of a permit or license. 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I) (West 2005).
The DOL has authority to investigate complaints, 8 U.S.C.A. § 1182(n)(2)(A); require payment of back wages to H-1B workers, 8 U.S.C.A. § 1182(n)(2)(D) (West 1999); and impose civil money penalties, 8 U.S.C.A. § 1182(n)(2)(C) (West 1999). See also 20 C.F.R. § 655.700, 810(a)- (b) (under 1995 and 2000 regulations). [FN1]
Pegasus was a management consulting company that employed foreign workers in the H-1B visa program to provide software (known to them as "SAP") to automate its customers' business operations. Hearing Transcript (Tr.) 441, 451, 462, 535. In its LCA applications, Pegasus averred that it would pay the higher of the "prevailing wage" or the

"actual wage" for each employee at issue. The INS approved the H-1B visas for the employees, Government Exhibit (G) 2-G20. Under employment agreements, Pegasus required each employee to pay a refundable security deposit of about $3,600. The employees arrived between late 1998 and mid-1999. Tr. 250, 346-47; G3, Tabs D & E; G5, Tabs D, E, & J; G7, Tab D; G14, Tab E; G15, Tab D; G17, Tab D; G18, Tabs D & E.
*2 Pegasus experienced a loss of business in early 1999, which resulted in a decision to stop paying ("lay-off") its H-1B workers. Tr. 463-67. It did not notify the INS, however, that they were "terminated," Respondent Pegasus Consulting Group, Inc.'s Memorandum of Law in Support of Petition for Review (Pegasus Brief) at 29 n.24, and at 30, because of obstacles (an annual cap) in obtaining new H-1B visas. [FN2] Tr. 445, 709. As of June 1999, Pegasus, relying on prior LCA and H1-B petitions, "reemployed" some of the laid off workers in-house in preparation for an anticipated outside contract. Tr. 483-89. Eventually, when the employment relationships ended, Pegasus conditioned return of the H-1B workers' security deposits on releases of any claim to back wages. Tr. 273, 399-400; G9, Tab E, pp. 84-90; G14, Tab D, J, K; G19, Tab L; G20, Tab P.
After complaints from ten H-1B workers, WHD investigated. Tr. 40. Pegasus furnished documentation showing that 18 of 19 H-1B workers at issue were "on leave without pay," Tr. 73-74; G21, before a number later "resumed active employment." Tr. 75; G21. Documents and interview statements established that the layoffs were not bona fide terminations, because Pegasus failed to notify the INS or to obtain new H1-B visas. Tr. 75, 133, 137, 172, 182-83, 188. The WHD Administrator determined that Pegasus failed to pay $288,218.04 in wages due and owing to 19 of the H-1B workers for non-productive time as mandated under 8 U.S.C.A. § 1182(n)(1)(A), 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I), and 20 C.F.R. § 655.731(c) (1995), and found those violations to be willful and knowing with respect to eight of the employees, and consequently assessed civil penalties in the amount of $40,000.00. Tr. 64-65; Administrative Law Judge (ALJ)-1. Pegasus requested a hearing before the Office of the Administrative Law Judges, see 20 C.F.R. § 655.820 (1995), which the assigned ALJ held on January 22, February 26, April 2, and April 3, 2002. He issued his decision, awarding $231,279.41 in back wages and affirming civil penalties of $40,000.00, on November 13, 2002. Both parties appealed. [FN3]

ISSUES

On appeal, Pegasus raises the following issues:
1) Whether Pegasus owed back wages to four H-1B workers who testified;
2) Whether Pegasus owed back wages to four H-1B workers who did not testify;
3) Whether Pegasus committed willful violations warranting imposition of civil money penalties.
On appeal, the Administrator raises the following issues:
1) Whether miscellaneous payment to H-1B workers must be credited as "wages;"
2) Whether H-1B workers who did not testify are due back wages;
3) Whether H-1B workers who testified that Pegasus did not owe them back wages are due back wages.

STANDARD OF REVIEW

The Administrative Review Board (ARB or the Board) has jurisdiction to review an ALJ's decision. 8 U.S.C.A. § 1182(n)(2) and 20 C.F.R. § 655.845. See also Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).
*3 Under the Administrative Procedure Act, the Board, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(B) (West 1996), quoted in Goldstein v. Ebasco Constructors, Inc., 1986-ERA-36, slip op. at 19 (Sec'y Apr. 7, 1992). The Board reviews the ALJ's decision de novo. United States Dep't of Labor v. Kutty, ARB No. 03-022, ALJ Nos. 2001-LCA-10 to 25, slip op. at 4 (ARB May 31, 2005); Yano Enters., Inc. v. Administrator, ARB No. 01- 050, ALJ No. 2001-LCA-0001, slip op. at 3 (ARB Sept. 26, 2001); Administrator v. Jackson, ARB No. 00-068, ALJ No. 1999-LCA-0004, slip op. at 3 (ARB Apr. 30, 2001). See generally Mattes v. United States Dep't of Agric., 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (rejecting argument that higher level administrative official was bound by ALJ's decision); McCann v. Califano, 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's decision by higher level administrative review body).

DISCUSSION

1. Back wages due to four workers who testified

This case turns on whether Pegasus placed the workers "on the bench" in unproductive status, which requires payment of wages, 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I), or whether bona fide terminations occurred, which ends the H-1B wage obligation. Pegasus contends that INS, not DOL has authority to decide whether a termination has occurred. Pegasus Brief at 34-35. The argument has no merit. Because WHD has authority to decide when wages are due, it must be able to determine when an H-1B worker enters or leaves employment. See 8 U.S.C.A. § 1182(n)(2)(A).
An employer is obligated to notify the INS of a termination of employment, so that the INS can cancel an H-1B worker's sponsorship. 8 C.F.R. § 214.2(h)(11) (2005). Although not controlling, the 2000 Preamble to 20 C.F.R. Part 655 is instructive. It says:

[U]nder no circumstances would the Department consider it to be a bona fide termination if the employer rehires the worker if or when work becomes available unless the H-1B worker has been working under an H-1B petition with another employer, the H-1B petition has been canceled and the worker has returned to the home country and been rehired by the employer, or the nonimmigrant is validly in the United States pursuant to a change of status.
65 Fed. Reg. 80110, 80171 (Dec. 20, 2000). Cf. 20 C.F.R. § 655.731(c)(7) ("Payment need not be made if there has been a bona fide termination of the employment relationship. INS regulations require the employer to notify INS that the employment relationship has been terminated so that the position is cancelled (8 C.F.R. [§] 214.2(h)(ii)).").

The evidence establishes that the Administrator and the ALJ correctly found that Pegasus did not effect bona fide terminations, and therefore Pegasus was under an obligation to pay wages to the employees for time periods at issue. For example, after discussions with Pegasus, the affected workers considered themselves to be laid off; they did not believe that Pegasus had terminated their employment. Tr. 275-76, 314-15, 335, 347, 378. As we now discuss, the ALJ correctly concluded that Pegasus violated the payment requirements of H-1B as to four former employees who testified at the hearing: Bikkani Veeraju, Ganapathi Sudeswaran, Jagadish Thosecan, Senthil Nathan.

Bikkani Veeraju

*4 Pegasus defends against its obligation to pay Veeraju on the ground that he was never authorized to come to the United States, and that he never worked at corporate headquarters. Pegasus Brief at 36-41.
However, Pegasus obtained an H-1B visa for Veeraju in accordance with an LCA, G20, Tab A; informed the United States Counsel General in India that it needed his services, Tr. 262, 557; G20, Tab B; entered into an employment agreement with him, Tr. 249-50; G20, Tab C; paid his travel from India, Tr. 251-52, 287, 289-90, 301, 303-04; G20, Tabs E & F; Respondent's Exhibit (R) 8; picked him up at the airport and put him up in a guesthouse, Tr. 302, 518; R8.
From January through August, Veeraju reported for work at the Pegasus office, except for a two-week period in April when he was assigned to a Pegasus client. Tr. 254-55, 257; R8; G20, Tab K. After complaining that he was unpaid, Pegasus gave him two checks for $500, which it called a "Salary Advance," representing the entire amount Pegasus ever paid him. Tr. 256, 258, 267; G20, Tab L; R 8.
Veeraju interviewed with another Pegasus customer in June 1999, but the job did not materialize. Tr. 258-59; R8. He worked in-house for Pegasus in July 1999. Tr. 259-60, 337-39; G2, Tab D; G9, Tab D, E & M; G14, Tab D & L; G18, Tabs D & F; G20, Tab M. Pegasus did not lead him to believe that his employment was terminated. Tr. 275-76, 314-15. But in September 1999, when Pegasus told Veeraju to leave its guesthouse, he resigned. Tr. 314; G20, Tab O. Almost a year later, Pegasus sent Veeraju a letter stating that he would have to agree that Pegasus owed him no back pay in order to obtain return of his $3,400 security deposit.
The evidence thus establishes that Veeraju was a Pegasus employee and that, as both the Administrator and ALJ concluded, Pegasus owes him back wages. G1, Tab 5; R. D. & O. at 3.

Ganapathi Sudeswaran

Pegasus contends that it has no obligation to pay Sudeswaran back wages, because it terminated his employment and then rehired him. Pegasus Brief at 42. The evidence is otherwise.
Pegasus applied for an H-1B visa for Sudeswaran under an approved LCA. G16, Tab A. Sudeswaran arrived in New Hampshire in October 1998 and worked on two paying projects, but was then taken off the second project because of a dispute between Pegasus and its customer and placed on unpaid, non-productive status from November 29, 1999

through March 15, 2000. Tr. 377, 386-87; G21. During that time, he complained about not being paid, he was never advised that his employment was terminated, and his H-1B visa status did not change. Tr. 377-78, 380, 385-88.

Pegasus recommenced paying Sudeswaran wages on March 16, 2000, when it brought him to New Jersey for training and later placed him on an assignment for a client. Tr. 378-380; G21, G27. Pegasus claimed that Sudeswaran was "on leave without pay" from November 24, 1999, through March 15, 2000. But Pegasus did not prove that a bona fide termination occurred in November 1999. Accordingly, WHD and the ALJ correctly determined that back wages were due and owing. ALJ1; G1, Tab 5; R. D. & O. at 3.

Jagadish Thosecan

*5 Pegasus claimed no obligation to pay Thosecan on the ground that he was never authorized to travel to the United States, and that his employment was terminated. Pegasus Brief at 43-46.

But the evidence established that Pegasus applied for an H-1B visa in accordance with an LCA, Tr. 332; G19, Tab A, and that it paid Thosecan's airfare to a Pegasus customer in San Francisco and put him up in a hotel, Tr. 341-42, 347; G19; Tab D, Tab F. When some glitch developed in the contract, Pegasus placed Thosecan in non-productive status, yet did not inform him that his employment was terminated. Tr. 335, 347; G19, Tab D. Rather, while he was benched from May 3 through July 7, 1999, Thosecan continued to call the office about available work. Tr. 335-36.

In July 1999, Pegasus flew Thosecan to New Jersey, where he lived in a Pegasus guesthouse and worked in-house for a total of $3,400 from July 7 through early October 1999. Tr. 336-8, 349; G19, Tabs D & E. Thosecan worked on an outside contract again from October 1999 through February 2000 and was paid the correct wage. Tr. 340, 347-48: G19, Tabs I & M. After Thosecan resigned in February 2000, Pegasus assessed a $5,000 penalty for short notice and told him to sign a Separation Agreement in which he agreed that Pegasus owed no back pay. G19, Tab L. During the WHD investigation, Pegasus contended that Thosecan was on leave without pay from April 1 through July 15, 1999. G21. The ALJ awarded unpaid wages, and we affirm. R. D. & O. at 4.

Senthil Nathan

Pegasus claimed no obligation to pay Nathan on the ground that he took a voluntary leave of absence. Pegasus Brief at 47.

Pegasus applied for an H-1B visa for Nathan in accordance with an LCA. Tr. 393; G11, Tab A. As of November 1998, he arrived in Michigan and worked on a Pegasus contract, but was then "benched." When he asked about his pay, he was told the company could not afford to pay benched people. Tr. 394-95. Nathan did not take this to be a termination, and Pegasus did not report his H-1B visa to INS as cancelled. Tr. 395. After he started a new assignment in November 1999, Pegasus presented him with an employment agreement that said Pegasus owed him no money. Nathan refused to sign it. Tr. 399-400. Pegasus admits that it did not pay wages to Nathan from September 20 through October 15, 1999, but claims that was because he was on a voluntary leave of

absence. Pegasus Brief at 47. Nathan denied being on leave. Tr. 405. The Administrator and ALJ awarded back wages for those weeks. We affirm.

2. Back wages due to workers who did not testify

The ALJ correctly held that "testimonial evidence provides an adequate representative basis to establish a pattern and practice of violation of the Act," R. D. & O. at 5, and accordingly held that some (but not all) of the H-1B workers who did not testify were eligible to recover unpaid wages.

Under labor statutes requiring payment of minimum wages, overtime pay, and prevailing wage rates, it is not necessary for every underpaid employee to testify in order to prove violations that require the award of back wages. Testimony and evidence from representative employees is enough to establish a pattern and practice applicable to all similarly situated employees. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88 (1940) (pattern or practice established with "sufficient evidence to show the amount and extent of that work [performed] as a matter of just and reasonable inference;" burden then shifts to employer to rebut existence of violations "with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence."). See also Reich v. Southern New England Telecomm. Corp., 121 F.3d 58, 67 (2d Cir. 1977); Martin v. Selker Bros., Inc., 949 F.2d 1286, 1298 (3d Cir. 1991); Cody-Zeigler, Inc. v. Administrator, Wage & Hour Div., ARB No. 01-014, 015, ALJ No. 97-DBA-17, slip op. at 8 (ARB Dec. 19, 2003).

*6 The H-1B workers who testified were sufficient to establish a pattern or practice regarding those who did not. Veeraju, Sudeswaran, Thosecan, and Nathan were computer consultants. So were the H-1B workers who did not testify. Pegasus failed to pay "benched" H-1B workers or "laid off" the H-1B workers who testified or failed to pay them when they worked at corporate headquarters rather than for Pegasus clients. The same is true of non-testifying employees. Pegasus claimed no obligation to pay the H-1B workers who did testify on the ground that they were never authorized to come to the United States (Veeraju; Thosecan); that they never worked at corporate headquarters (Veeraju); that they took voluntary leaves of absence (Nathan); or that their employment was terminated (Sudeswaran; Thosecan) and they were re-hired. And it made those same arguments with regard to the workers who did not testify. Pegasus Brief at 24-28.

As the Administrator discusses, there was corroboration for representative testimony on wage deficiencies. Brief of the Wage and Hour Administrator in Response to Respondent's Petition for Review (Administrator's Brief) at 26-27. Contrary to Pegasus's assertions, Pegasus authorized Shailesh Beri's travel and paid his fare. Id. Pegasus did not terminate Rajendra Singh's employment in August 1999. Id. The statements of Veskastesan Iyengar and Meenakshi Sundararaman overcome Pegasus's assertions that their employment was terminated. Id. And Pegasus's acknowledgment that it hired, fired, and rehired Krishnanand Adka, Anupam Kumar, Jitendra Pahadia, Sriram Subramariam, and Srinivas Tangilara supports a finding that the "terminations" were not authentic. Id.

Pegasus contends that statements that H-1B workers made during the WHD investigation were erroneously admitted hearsay. Pegasus Brief at 10-23. Although the ALJs have adopted the Federal Rules of Evidence, including those pertaining to hearsay, see 29 C.F.R. Part 18, subpart B (29 C.F.R. §§ 18.801-18.806) (2005), the rules of practice

governing adjudication of the H-1B program specifically allow consideration of hearsay evidence:

[A]ny oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18 subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

20 C.F.R. § 655.825(b) (1995).

Therefore, on proof of pattern or practice, it was within the ALJ's discretion and not error to admit witness statements in lieu of their testimony on the basis that, once representative testimony was in the record, additional testimony would have been "unduly repetitive" (i.e., cumulative).

*7 Three of the H-1B workers did not give interview statements to the WHD investigator and also did not testify at trial. They are Sathiyamoorth Koteeswaran, Hanumachastry Rupakala; and Bhaskar Ganguli. Because of that, the ALJ ruled that the Administrator failed to meet her burden of proof with respect to unpaid wages for those H-1B workers. R. D. & O. at 8. The issue we address is whether, notwithstanding their failure to testify or give witness statements, the evidence establishes that those H-1B workers are entitled to unpaid wages.

Here as well the Administrator proved a pattern or practice of violations by Pegasus by means of representative testimony of the four H-1B workers. The Administrator proved that the remaining H-1B workers were not paid for their nonproductive time as 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I) requires. The three workers who neither testified nor gave witness statements were employed as programmer/analysts on client sites, Pegasus claimed they were put on "leave without pay" without bona fide terminations, and they resumed work on client projects using their original H-1B visas. Tr. 259-61, 270, 333-34, 339, 820-21; Exh G2, Tab D; G3, Tabs D & E; G5, Tabs D & E; G7, Tab D; G9, Tabs D & E; G14, Tabs D & L; G15, Tab D; G17, Tab D; G18, Tabs D, E, and F; G21; G23, G24, G27; R15, R18. The H-1B workers and the amounts the WHD determined they are due are: Koteeswaran - $23,323.47; Rupakala - $748.85; and Ganguli - $8,273.07.

In sum, based upon the representative testimony of witnesses, corroborating evidence, and reliable hearsay, the Administrator established the right of non-testifying witnesses to back wages. In addition to the ALJ's ruling, we award back wages to three additional H-1B workers who did not testify.

3. Back wages due to workers who testified they were not owed back wages

We next consider whether Pegasus owes back wages to two H-1B workers who testified that no wages were due and owing to them. They were Neerai Jain and Sridhar Mukunda, both Pegasus employees when they testified.

The ALJ found Jain's testimony not credible, because Jain's job and visa status depended upon Pegasus. R. D. & O. at 6 n. 14. Nevertheless, the ALJ accepted the portion of Jain's testimony in which he said Pegasus did not owe him money, because his employment with Pegasus was terminated, he accepted work with another consulting company, and Pegasus eventually reemployed him. R. D. & O. at 5. Yet the evidence was that there was

no bona fide termination for Jain. Pegasus told him they could not pay him, but did not notify him or the INS of the termination of his employment, as INS regulations require, 8 C.F.R. § 214.2(h)(11), and Jain never actually began ("entered into") employment with the other company, 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I), (II), (III). Tr. 651- 52, 816-17, 831, 834. After a layoff, Pegasus put Jain back to work on a consulting project in August 1999. Jain therefore falls into the category of employees who were temporarily laid off (and unpaid) due to lack of work. He is entitled to back pay of $11,736.96, for May 16 through September 5, 1999. Tr. 837-38; Ex. G21, G27.

*8 Similarly, the ALJ believed only the portion of Mukunda's testimony that Pegasus owed him no money. R. D. & O. at 5. But the record shows that Mukunda submitted time sheets to Pegasus, but like the others, was placed on leave without pay, in his case from September 19 through October 31, 1999, then resumed work for Pegasus in November 1999, while under the original H-1B visa. Tr. 788-93, 796, 799, 800-01; Ex. G10, Tab D; G21. We adopt the Administrator's calculation of the amount of the deficiency as $5,769.24.

In short, through representative testimony and records, the Administrator proved that Jain and Mukunda were not on voluntary leaves of absence and that Pegasus did not properly terminate their employment. Therefore, Pegasus must pay the proper wage rate for those nonproductive times.

4. Miscellaneous payments not wages

The Administrator argues that the ALJ improperly gave credit to Pegasus for miscellaneous payments to four H-1B workers as salary advances. Administrator's Brief, at 13-16.

Payments to H-1B workers do not qualify as "wages paid" unless they are:

(i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for authorized deductions;

(ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS . . . .

20 C.F.R. § 655-731(c)(2)(i)-(ii) (1995). See also 59 Fed. Reg. 65646, 65652-53 (Dec. 20, 1994) (amounts to be treated as "wages paid" shall be paid to the employee free and clear when due).

In this case, Pegasus made payments to four of the H-1B workers that the ALJ credited as "salary advances" toward "wages paid." But they do not qualify as "wages paid" because they were not shown on Pegasus's payroll records and they were not reported to the IRS. Tr. 92. We consequently include the following amounts as due and owing to the following H-1B workers: Veeraju - $1,000; Singh - $1,600; Adka - $3,400; and Tangilara - $400.

5. Willful violations warranting civil penalties

Lastly, we consider whether Pegasus committed willful violations warranting imposition of civil money penalties. The ALJ found that management "knowingly fail[ed] to pay the legally required wages." R. D. & O. at 9.

The Administrator has the authority to impose civil penalties for willful violations of the H-1B requirements. 8 U.S.C.A. § 1182(n)(2)(C); 20 C.F.R. § 655.810(b) (1995 and 2000 regulations). A "willful" violation is a knowing failure to comply or a reckless disregard of whether the conduct complied with 8 U.S.C.A. § 1182(n)(1)(A)(i) or (ii), 20 C.F.R. § 655.731, or 20 C.F.R. § 655.732. But see McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988) (a good faith, but mistaken belief in compliance defeats willfulness). Pegasus effectively admitted its willful non-compliance when it said that it:

*9 may have had some general knowledge of its obligations to pay employees, its obligation to notify the INS upon the cessation of an H-1B worker ..., the obligation to pay H-1B employees while on "the bench," [and] its responsibility to provide transportation to the H-1B employees' country of origin upon cessation of employment.

Pegasus Brief at 49. Although aware of its obligation to pay H-1B workers for non-productive time, see Tr. 445, 462, 500, 556, 565, 612, 665, 709, Pegasus rationalized its non-compliance on the basis of lack of funds, Tr. 464-65, 537- 38, and then tried to characterize the lay offs as terminations. In addition, Pegasus improperly conditioned return of the H-1B workers' security deposits on a release of any claims to back pay. Tr. 264, 273, 399-400; G9, Tab E. On these facts, we conclude that the violations were willful.

The Administrator imposed civil penalties pertaining to only eight of the workers of $5,000 each (for a total of $40,000), although it found violations regarding 19 workers. We find this to be a moderate exercise of the administrator's authority under the circumstances, as did the ALJ, R. D. & O. at 8, and accept that as the total assessment.

CONCLUSION

The Administrator proved that Pegasus violated the provisions of the H-1B program. Except as aforesaid, we accept the recommendation of the ALJ with regard to the amounts of back wages and civil penalties. In addition, we award the following amounts to be paid by Pegasus on behalf of the following H-1B workers: Koteeswaran - $23,323.47; Rupakala - $748.85; Ganguli - $8,273.07; Jain - $11,736.96; Mukunda - $5,769.24; Veeraju - $1,000.00; Singh - $1,600.00; Adka - $3,400.00; Tangilara - $400.00.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

FN1. Because the 1995 regulation at 20 C.F.R. § 655.731(c)(5) (1995), requiring an employer to compensate H-1B workers for non-productive time, was declared invalid on procedural grounds, Nat'l Assoc. of Mfrs. v. United States Dep't of Labor, Civ. A. No. 95-0715, 1996 WL 420868 (D.D.C. July 22, 1996), aff'd and remanded on other grounds, 159 F.3d 597 (D.C. Cir. 1998), we have applied 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I), which is the same as the invalidated regulation. See Brief of the Wage and Hour Administrator in Support of her Petition for Review at 3.

FN2. When an H-1B employer does not have enough work to pay required wages, the proper procedure is for the employer to "terminate the employment of the H-1B worker, notify the INS, pay the worker's return to his/her country of origin ..., and no longer be subject to the H-1B program's required wage." 64 Fed. Reg. 628, 647 (Jan. 5, 1999).

FN3. Nine of the H-1B workers on whose behalf the Administrator prosecuted below sought to intervene in the appeal, but, because they had not participated as "interested parties," we denied the motion. Joshi v. Pegasus Consulting Group, ARB No. 03-034, ALJ No. 2001-LCA-29 (ARB July 29, 2003).

Attachment 5

Wal-Mart paid 11 million dollars in settling immigration violation claims. They allegedly used independent contractors who employed illegal aliens. Traditionally, we had to worry about W-2 employees only.

Public Information

Protecting National Security and Upholding Public Safety

Inside ICE: Volume 2, Issue 7

INSIDE THIS ISSUE

ICE, Wal-Mart Reach $11 Million Settlement

An ICE investigation led to

a landmark $11 million settlement agreement with Wal-Mart Stores, Inc.

WASHINGTON, D.C. - An ICE investigation into the hiring of illegal aliens by contractors that provided cleaning services to Wal-Mart Stores, Inc., ended March 18 with a landmark $11 million civil settlement.

In addition, 12 corporations that provided contract janitorial services to Wal-Mart stores have agreed to forfeit an additional $4 million to the United States and have agreed to enter corporate guilty pleas to criminal immigration charges.

Announced by Assistant Secretary Michael Garcia, the $11 million civil settlement and the $4 million criminal forfeiture constitute the two most significant enforcement actions in the field of immigration employment sanctions since the laws were first enacted in 1986. The $11 million civil settlement alone is approximately four times larger than any other single payment received by the government in an illegal alien employment case.

“This case breaks new ground not only because this is a record dollar amount for a civil immigration settlement, but because this settlement requires Wal-Mart to create an internal program to ensure future compliance with immigration laws by Wal-Mart contractors and by Wal-Mart itself,” said Assistant Secretary Garcia. “ICE is committed to not only bringing charges against companies that violate our nation's immigration laws, but also working with them to ensure that they have programs in place to prevent future violations."

The case was a nationwide investigation into alleged employment of illegal aliens by cleaning companies that provided contract services to Wal-Mart. It was conducted by ICE, the U.S. Attorney’s Office for the Middle District of Pennsylvania, with the assistance of the Pennsylvania Attorney General’s Office and the Honesdale, Pa., Police Department.

The investigation evolved out of two prior immigration operations that began in 1998 and 2001, respectively. These operations targeted cleaning contractors that were hiring unauthorized workers from Eastern Europe.

[ICE Deports Aliens Who Abused Children]

[ICE Nabs Man In $23 Million Syrian Money Scheme]

[ICE Deports Man Who Tried to Murder New York Shop Owner]

[ICE Returns Money to Elderly Victim of Telemarketing Scam]

[Record-Setting Seven Ton Pot Seizure Found in Texas Trucks]

[Dino Bones]

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The follow-up investigation culminated on October 23, 2003, with a series of immigration enforcement actions at some 60 Wal-Mart stores in 21 states. In these actions, ICE agents arrested approximately 245 illegal aliens employed by cleaning contractors and put these individuals into deportation proceedings.

Immediately following these enforcement actions, officials at Wal-Mart contacted federal authorities and pledged cooperation in the investigation into the employment practices of its cleaning contractors. Wal-Mart also renewed its commitment to ensure full compliance with federal immigration laws. The corporate commitment by Wal-Mart led to the discussions that resulted in the civil settlement.

Under the terms of this civil settlement, Wal-Mart has agreed to the entry of a consent decree that:

- Directs Wal-Mart to make a payment of $11 million through the United States Attorney's Office;
- Permanently enjoins Wal-Mart from knowingly hiring, recruiting and continuing to employ unauthorized aliens workers; Directs Wal-Mart to establish a means to verify that independent contractors are also taking reasonable steps to comply with immigration laws;
- Directs Wal-Mart to provide, over the next 18 months, all of its store managers and future store managers with training regarding immigration employment laws while complying with pertinent anti-discrimination laws;
- Directs Wal-Mart to maintain its own pre-existing program of taking reasonable steps to ensure that Wal-Mart employees are authorized to work in the United States, while complying with pertinent anti-discrimination laws;
- Directs Wal-Mart to continue cooperation in the investigation of the alleged illegal employment.

The civil settlement does not entail any admission of wrongdoing by any party.

COMMENTS / CONTRIBUTIONS

Inside ICE is an e-newsletter produced by the ICE Office of Public Affairs to inform the public about the mission, operations and activities of U.S. Immigration and Customs Enforcement. Please send comments and contributions to Russ Bergeron, Editor.

425 I St NW
Washington, D.C. 20536
Attn: Office of Public Affairs
Russ Bergeron, Editor
Phone: 202-514-2648
Fax: 202-514-1776
Russ.Bergeron@dhs.gov

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U.S. Immigration and Customs Enforcement (ICE)

Attachments 6 and 7

Two executive orders declaring debarment penalty for federal contractors if they are found to be in violation of immigration compliance. Initiated by Pres. Clinton in 1996, this executive order is still in place under Pres. Bush.

federal register

Thursday
February 15, 1996

Part IV

The President

Executive Order 12989—Economy and Efficiency in Government Procurement Through Compliance With Certain Immigration and Naturalization Act Provisions

Federal Register
Vol. 61, No. 32
Thursday, February 15, 1996

Presidential Documents

Title 3—

The President

Executive Order 12989 of February 13, 1996

Economy and Efficiency in Government Procurement Through Compliance With Certain Immigration and Naturalization Act Provisions

This order is designed to promote economy and efficiency in Government procurement. Stability and dependability are important elements of economy and efficiency. A contractor whose work force is less stable will be less likely to produce goods and services economically and efficiently than a contractor whose work force is more stable. It remains the policy of this Administration to enforce the immigration laws to the fullest extent, including the detection and deportation of illegal aliens. In these circumstances, contractors cannot rely on the continuing availability and service of illegal aliens, and contractors that choose to employ unauthorized aliens inevitably will have a less stable and less dependable work force than contractors that do not employ such persons. Because of this Administration's vigorous enforcement policy, contractors that employ unauthorized alien workers are necessarily less stable and dependable procurement sources than contractors that do not hire such persons. I find, therefore, that adherence to the general policy of not contracting with providers that knowingly employ unauthorized alien workers will promote economy and efficiency in Federal procurement.

NOW, THEREFORE, to ensure the economical and efficient administration and completion of Federal Government contracts, and by the authority vested in me as President by the Constitution and the laws of the United States of America, including 40 U.S.C. 486(a) and 3 U.S.C. 301, it is hereby ordered as follows:

Section 1. (a) It is the policy of the executive branch in procuring goods and services that, to ensure the economical and efficient administration and completion of Federal Government contracts, contracting agencies should not contract with employers that have not complied with section 274A(a)(1)(A) and 274A(a)(2) of the Immigration and Nationality Act (8 U.S.C. 1324a(a)(1)(A), 1324a(a)(2)) (the ''INA employment provisions'') prohibiting the unlawful employment of aliens. All discretion under this Executive order shall be exercised consistent with this policy.

(b) It remains the policy of this Administration to fully and aggressively enforce the antidiscrimination provisions of the Immigration and Nationality Act to the fullest extent. Nothing in this order relieves employers from their obligation to avoid unfair immigration-related employment practices as required by the antidiscrimination provisions of section 1324(b) of the INA (8 U.S.C. 1324b) and all other antidiscrimination requirements of applicable law, including the requirements of 8 U.S.C. 1324b(a)(6) concerning the treatment of certain documentary practices as unfair immigration-related employment practices.

Sec. 2. Contractor, as used in this Executive order, shall have the same meaning as defined in subpart 9.4 of the Federal Acquisition Regulation.

Sec. 3. Using the procedures established pursuant to 8 U.S.C. 1324a(e), the Attorney General: (a) may investigate to determine whether a contractor or an organizational unit thereof is not in compliance with the INA employment provisions;

(b) shall receive and may investigate complaints by employees of any entity covered under section 3(a) of this order where such complaints allege noncompliance with the INA employment provisions; and

(c) shall hold such hearings as are required under 8 U.S.C. 1324a(e) to determine whether an entity covered under section 3(a) is not in compliance with the INA employment provisions.

Sec. 4. (a) Whenever the Attorney General determines that a contractor or an organizational unit thereof is not in compliance with the INA employment provisions, the Attorney General shall transmit that determination to the appropriate contracting agency and such other Federal agencies as the Attorney General may determine. Upon receipt of such determination from the Attorney General, the head of the appropriate contracting agency shall consider the contractor or an organizational unit thereof for debarment as well as for such other action as may be appropriate in accordance with the procedures and standards prescribed by the Federal Acquisition Regulation.

(b) The head of the contracting agency may debar the contractor or an organizational unit thereof based on the determination of the Attorney General that it is not in compliance with the INA employment provisions. The Attorney General's determination shall not be reviewable in the debarment proceedings.

(c) The scope of the debarment generally should be limited to those organizational units of a Federal contractor that the Attorney General finds are not in compliance with the INA employment provisions.

(d) The period of the debarment shall be for 1 year and may be extended for additional periods of 1 year if, using the procedures established pursuant to 8 U.S.C. 1324a(e), the Attorney General determines that the organizational unit of the Federal contractor continues to be in violation of the INA employment provisions.

(e) The Administrator of General Services shall list a debarred contractor or an organizational unit thereof on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs and the contractor or an organizational unit thereof shall be ineligible to participate in any procurement or nonprocurement activities.

Sec. 5. (a) The Attorney General shall be responsible for the administration and enforcement of this order, except for the debarment procedures. The Attorney General may adopt such additional rules and regulations and issue such orders as may be deemed necessary and appropriate to carry out the responsibilities of the Attorney General under this order. If the Attorney General proposes to issue rules, regulations, or orders that affect the contracting departments and agencies, the Attorney General shall consult with the Secretary of Defense, the Secretary of Labor, the Administrator of General Services, the Administrator of the National Aeronautics and Space Administration, the Administrator for Federal Procurement Policy, and such other agencies as may be appropriate.

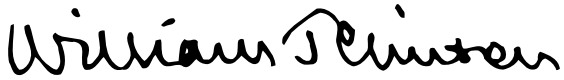
(b) The Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration shall amend the Federal Acquisition Regulation to the extent necessary and appropriate to implement the debarment responsibility and other related responsibilities assigned to heads of contracting departments and agencies under this order.

Sec. 6. Each contracting department and agency shall cooperate with and provide such information and assistance to the Attorney General as may be required in the performance of the Attorney General's functions under this order.

Sec. 7. The Attorney General, the Secretary of Defense, the Administrator of General Services, the Administrator of the National Aeronautics and Space Administration, and the heads of contracting departments and agencies may delegate any of their functions or duties under this order to any officer or employee of their respective agencies.

Sec. 8. This order shall be implemented in a manner intended to least burden the procurement process. This order neither authorizes nor requires any additional certification provision, clause, or requirement to be included in any contract or contract solicitation.

Sec. 9. This order is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or its employees. This order is not intended, however, to preclude judicial review of final agency decisions in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*



THE WHITE HOUSE,
February 13, 1996.

[FR Doc. 96–3646
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Federal Register

Wednesday,

March 5, 2003

Part IV

The President

Executive Order 13286—Amendment of Executive Orders, and Other Actions, in Connection With the Transfer of Certain Functions to the Secretary of Homeland Security

Executive Order 13287—Preserve America

Federal Register
Vol. 68, No. 43
Wednesday, March 5, 2003

Presidential Documents

Title 3—

The President

Executive Order 13286 of February 28, 2003

Amendment of Executive Orders, and Other Actions, in Connection With the Transfer of Certain Functions to the Secretary of Homeland Security

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Homeland Security Act of 2002 (Public Law 107–296) and section 301 of title 3, United States Code, and in order to reflect the transfer of certain functions to, and other responsibilities vested in, the Secretary of Homeland Security, the transfer of certain agencies and agency components to the Department of Homeland Security, and the delegation of appropriate responsibilities to the Secretary of Homeland Security, it is hereby ordered as follows:

Section 1. Executive Order 13276 of November 15, 2002 (''Delegation of Responsibilities Concerning Undocumented Aliens Interdicted or Intercepted in the Caribbean Region''), is amended by:

(a) striking ''The Attorney General'' wherever it appears in section 1 and inserting ''The Secretary of Homeland Security'' in lieu thereof; and

(b) striking ''the Attorney General'' wherever it appears in section 1 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 2. Executive Order 13274 of September 18, 2002 (''Environmental Stewardship and Transportation Infrastructure Project Reviews''), is amended by inserting ''Secretary of Homeland Security,'' after ''Secretary of Defense,'' in section 3(b).

Sec. 3. Executive Order 13271 of July 9, 2002 (''Establishment of the Corporate Fraud Task Force''), is amended by:

(a) inserting ''(b) the Secretary of Homeland Security;'' after ''(a) the Secretary of the Treasury;'' in section 4; and

(b) relettering the subsequent subsections in section 4 appropriately.

Sec. 4. Executive Order 13260 of March 19, 2002 (''Establishing the President's Homeland Security Advisory Council and Senior Advisory Committees for Homeland Security''), is amended by:

(a) striking ''the Assistant to the President for Homeland Security (Assistant)'' in section 1(c) and inserting ''the Secretary of Homeland Security (Secretary)'' in lieu thereof;

(b) striking ''the Assistant'' wherever it appears in sections 2 and 3 and inserting ''the Secretary'' in lieu thereof;

(c) striking ''the Office of Administration'' in section 3(d) and inserting ''the Department of Homeland Security'' in lieu thereof;

(d) striking ''the Administrator of General Services'' in section 4(a) and inserting ''the Secretary of Homeland Security'' in lieu thereof; and

(e) inserting ''of General Services'' after ''Administrator'' in section 4(a).

Executive Order 13260 of March 19, 2002, is hereby revoked effective as of March 31, 2003.

Sec. 5. Executive Order 13257 of February 13, 2002 (''President's Interagency Task Force to Monitor and Combat Trafficking in Persons''), is amended by:

(a) inserting ''(v) the Secretary of Homeland Security;'' after ''(iv) the Secretary of Health and Human Services;'' in section 1(b); and

(b) renumbering the subsequent subsections in section 1(b) appropriately.

Sec. 6. Executive Order 13254 of January 29, 2002 (''Establishing the USA Freedom Corps''), is amended by striking ''Director of the Federal Emergency Management Agency;'' in section 3(b)(viii) and inserting ''Secretary of Homeland Security;'' in lieu thereof.

Sec. 7. Executive Order 13231 of October 16, 2001 (''Critical Infrastructure Protection in the Information Age''), as amended, is further amended to read in its entirety as follows:

''Critical Infrastructure Protection in the Information Age

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure protection of information systems for critical infrastructure, including emergency preparedness communications and the physical assets that support such systems, in the information age, it is hereby ordered as follows:

Section 1. *Policy.* The information technology revolution has changed the way business is transacted, government operates, and national defense is conducted. Those three functions now depend on an interdependent network of critical information infrastructures. It is the policy of the United States to protect against disruption of the operation of information systems for critical infrastructure and thereby help to protect the people, economy, essential human and government services, and national security of the United States, and to ensure that any disruptions that occur are infrequent, of minimal duration, and manageable, and cause the least damage possible. The implementation of this policy shall include a voluntary public-private partnership, involving corporate and nongovernmental organizations.

Sec. 2. *Continuing Authorities.* This order does not alter the existing authorities or roles of United States Government departments and agencies. Authorities set forth in 44 U.S.C. chapter 35, and other applicable law, provide senior officials with responsibility for the security of Federal Government information systems.

(a) Executive Branch Information Systems Security. The Director of the Office of Management and Budget (OMB) has the responsibility to develop and oversee the implementation of government-wide policies, principles, standards, and guidelines for the security of information systems that support the executive branch departments and agencies, except those noted in section 2(b) of this order. The Director of OMB shall advise the President and the appropriate department or agency head when there is a critical deficiency in the security practices within the purview of this section in an executive branch department or agency.

(b) National Security Information Systems. The Secretary of Defense and the Director of Central Intelligence (DCI) shall have responsibility to oversee, develop, and ensure implementation of policies, principles, standards, and guidelines for the security of information systems that support the operations under their respective control. In consultation with the Assistant to the President for National Security Affairs and the affected departments and agencies, the Secretary of Defense and the DCI shall develop policies, principles, standards, and guidelines for the security of national security information systems that support the operations of other executive branch departments and agencies with national security information.

(i) Policies, principles, standards, and guidelines developed under this subsection may require more stringent protection than those developed in accordance with section 2(a) of this order.

(ii) The Assistant to the President for National Security Affairs shall advise the President and the appropriate department or agency when there is a critical deficiency in the security practices of a department or agency within the purview of this section.

(iii) National Security Systems. The National Security Telecommunications and Information Systems Security Committee, as established by

and consistent with NSD–42 and chaired by the Department of Defense, shall be designated as the ''Committee on National Security Systems.''

(c) Additional Responsibilities. The heads of executive branch departments and agencies are responsible and accountable for providing and maintaining adequate levels of security for information systems, including emergency preparedness communications systems, for programs under their control. Heads of such departments and agencies shall ensure the development and, within available appropriations, funding of programs that adequately address these mission systems, especially those critical systems that support the national security and other essential government programs. Additionally, security should enable, and not unnecessarily impede, department and agency business operations.

Sec. 3. *The National Infrastructure Advisory Council.* The National Infrastructure Advisory Council (NIAC), established on October 16, 2001, shall provide the President through the Secretary of Homeland Security with advice on the security of information systems for critical infrastructure supporting other sectors of the economy: banking and finance, transportation, energy, manufacturing, and emergency government services.

(a) Membership. The NIAC shall be composed of not more than 30 members appointed by the President. The members of the NIAC shall be selected from the private sector, academia, and State and local government. Members of the NIAC shall have expertise relevant to the functions of the NIAC and generally shall be selected from industry Chief Executive Officers (and equivalently ranked leaders of other organizations) with responsibilities for security of information infrastructure supporting the critical sectors of the economy, including banking and finance, transportation, energy, communications, and emergency government services. Members shall not be full-time officials or employees of the executive branch of the Federal Government. The President shall designate a Chair and Vice Chair from among the members of the NIAC.

(b) Functions of the NIAC. The NIAC will meet periodically to:

(i) enhance the partnership of the public and private sectors in protecting information systems for critical infrastructures and provide reports on this issue to the Secretary of Homeland Security, as appropriate;

(ii) propose and develop ways to encourage private industry to perform periodic risk assessments of critical information and telecommunications systems;

(iii) monitor the development of private sector Information Sharing and Analysis Centers (ISACs) and provide recommendations to the President through the Secretary of Homeland Security on how these organizations can best foster improved cooperation among the ISACs, the Department of Homeland Security, and other Federal Government entities;

(iv) report to the President through the Secretary of Homeland Security, who shall ensure appropriate coordination with the Assistant to the President for Homeland Security, the Assistant to the President for Economic Policy, and the Assistant to the President for National Security Affairs under the terms of this order; and

(v) advise lead agencies with critical infrastructure responsibilities, sector coordinators, the Department of Homeland Security, and the ISACs.

(c) Administration of the NIAC.

(i) The NIAC may hold hearings, conduct inquiries, and establish subcommittees, as appropriate.

(ii) Upon request of the Chair, and to the extent permitted by law, the heads of the executive departments and agencies shall provide the NIAC with information and advice relating to its functions.

(iii) Senior Federal Government officials may participate in the meetings of the NIAC, as appropriate.

(iv) Members shall serve without compensation for their work on the NIAC. However, members may be reimbursed for travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in Federal Government service (5 U.S.C. 5701–5707).

(v) To the extent permitted by law and subject to the availability of appropriations, the Department of Homeland Security shall provide the NIAC with administrative services, staff, and other support services, and such funds as may be necessary for the performance of the NIAC's functions.

(d) General Provisions.

(i) Insofar as the Federal Advisory Committee Act, as amended (5 U.S.C. App.) (Act), may apply to the NIAC, the functions of the President under that Act, except that of reporting to the Congress, shall be performed by the Department of Homeland Security in accordance with the guidelines and procedures established by the Administrator of General Services.

(ii) The NIAC shall terminate on October 15, 2003, unless extended by the President.

(iii) Executive Order 13130 of July 14, 1999, was revoked on October 16, 2001.

(iv) Nothing in this order shall supersede any requirement made by or under law.

Sec. 4. *Judicial Review.* This order does not create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its depart ments, agencies, or other entities, its officers or employees, or any other person.''

Sec. 8. Executive Order 13228 of October 8, 2001 (''Establishing the Office of Homeland Security and the Homeland Security Council''), as amended, is further amended by:

(a) amending section 3(g) to read ''(g) *Incident Management.* Consistent with applicable law, including the statutory functions of the Secretary of Homeland Security, the Assistant to the President for Homeland Security shall be the official primarily responsible for advising and assisting the President in the coordination of domestic incident management activities of all departments and agencies in the event of a terrorist threat, and during and in the aftermath of terrorist attacks, major disasters, or other emergencies, within the United States. Generally, the Assistant to the President for Homeland Security shall serve as the principal point of contact for and to the President with respect to the coordination of such activities. The Assistant to the President for Homeland Security shall coordinate with the Assistant to the President for National Security Affairs, as appropriate.''; and

(b) inserting '', including the Department of Homeland Security'' after ''Government departments and agencies'' in section 7.

Sec. 9. Executive Order 13223 of September 14, 2001 (''Ordering the Ready Reserve of the Armed Forces to Active Duty and Delegating Certain Authorities to the Secretary of Defense and the Secretary of Transportation''), as amended, is further amended by:

(a) striking ''the Secretary of Transportation'' in the title and wherever it appears in sections 1, 5, 6, and 7, and inserting ''the Secretary of Homeland Security'' in lieu thereof; and

(b) striking ''the Department of Transportation'' in section 7 and inserting ''the Department of Homeland Security'' in lieu thereof.

Sec. 10. Executive Order 13212 of May 18, 2001 (''Actions to Expedite Energy-Related Projects''), is amended by inserting ''Homeland Security,'' after ''Veterans Affairs,'' in section 3.

Sec. 11. Executive Order 13165 of August 9, 2000 (''Creation of the White House Task Force on Drug Use in Sports and Authorization for the Director of the Office of National Drug Control Policy to Serve as the United States

Government's Representative on the Board of the World Anti-Doping Agency''), is amended by inserting ''the Department of Homeland Security,'' after ''the Department of Transportation,'' in section 2.

Sec. 12. Executive Order 13154 of May 3, 2000 (''Establishing the Kosovo Campaign Medal''), is amended by striking ''the Secretary of Transportation'' in section 1 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 13. Executive Order 13133 of August 5, 1999 (''Working Group on Unlawful Conduct on the Internet''), is amended by:

(a) inserting ''(6) The Secretary of Homeland Security.'' after ''(5) The Secretary of Education.'' in section 3(a); and

(b) renumbering the subsequent subsections in section 3(a) appropriately.

Sec. 14. Executive Order 13120 of April 27, 1999 (''Ordering the Selected Reserve and Certain Individual Ready Reserve Members of the Armed Forces to Active Duty''), is amended by striking ''the Secretary of Transportation'' and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 15. Executive Order 13112 of February 3, 1999 (''Invasive Species''), is amended by inserting ''the Secretary of Homeland Security,'' after ''Secretary of Transportation,'' in section 3(a).

Sec. 16. Executive Order 13100 of August 25, 1998 (''President's Council on Food Safety''), is amended by inserting ''and Homeland Security,'' after ''Health and Human Services,'' in section 1(a).

Sec. 17. Executive Order 13076 of February 24, 1998 (''Ordering the Selected Reserve of the Armed Forces to Active Duty''), is amended by striking ''the Secretary of Transportation'' and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 18. Executive Order 13011 of July 16, 1996 (''Federal Information Technology''), as amended, is further amended by:

(a) striking ''17. Federal Emergency Management Agency;'' in section 3(b); and

(b) renumbering the subsequent subsections in section 3(b) appropriately.

Sec. 19. Executive Order 12989 of February 13, 1996 (''Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Naturalization Act Provisions''), is amended by:

(a) striking ''Naturalization'' in the title and inserting ''Nationality'' in lieu thereof;

(b) striking '', the Attorney General'' in section 3;

(c) inserting ''the Secretary of Homeland Security'' before ''may'' in section 3(a);

(d) inserting ''the Secretary of Homeland Security'' before ''shall'' in section 3(b);

(e) inserting ''the Attorney General'' before ''shall'' in section 3(c);

(f) inserting ''Secretary of Homeland Security or the'' before ''Attorney General'' wherever it appears in section 4;

(g) striking ''The Attorney General's'' in section 4(b) and inserting ''Such'' in lieu thereof;

(h) striking ''the Attorney General'' wherever it appears in the first two sentences of section 5(a) and inserting ''the Secretary of Homeland Security and Attorney General'' in lieu thereof;

(i) striking ''the responsibilities of the Attorney General'' in section 5(a) and inserting ''their respective responsibilities'' in lieu thereof;

(j) inserting ''Secretary of Homeland Security or the'' before ''Attorney General'' wherever in appears in the third sentence of section 5(a);

(k) inserting ''Secretary of Homeland Security and the'' before ''Attorney General'' in section 6;

(l) striking ''the Attorney General's'' in section 6 and inserting ''their respective'' in lieu thereof; and

(m) inserting ''Secretary of Homeland Security, the'' before ''Attorney General'' in section 7.

Sec. 20. Executive Order 12985 of January 11, 1996 (''Establishing the Armed Forces Service Medal''), is amended by striking ''the Secretary of Transportation'' in section 2 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 21. Executive Order 12982 of December 8, 1995 (''Ordering the Selected Reserve of the Armed Forces to Active Duty''), is amended by striking ''the Secretary of Transportation'' and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 22. Executive Order 12978 of October 21, 1995 (''Blocking Assets and Prohibiting Transactions with Significant Narcotics Traffickers''), is amended by inserting '', the Secretary of Homeland Security,'' after ''the Attorney General'' wherever it appears in sections 1 and 4.

Sec. 23. Executive Order 12977 of October 19, 1995 (''Interagency Security Committee''), is amended by:

(a) striking ''the Administrator of General Services (''Administrator'')'' in section 1(a) and inserting ''the Secretary of Homeland Security (''Secretary'')'' in lieu thereof;

(b) striking ''and'' after ''(16) Central Intelligence Agency;'' in section 1(b);

(c) inserting ''and (18) General Services Administration;'' after ''(17) Office of Management and Budget;'' in section 1(b);

(d) striking section 1(c)(2) and redesignating sections 1(c)(3) and 1(c)(4) as sections 1(c)(2) and 1(c)(3), respectively;

(e) striking ''Administrator'' wherever it appears in sections 2, 5(a)(3)(E), 6(a), and 6(c), and inserting ''Secretary'' in lieu thereof; and

(f) striking '', acting by and through the Assistant Commissioner,'' in section 6(c).

Sec. 24. Executive Order 12919 of June 3, 1994 (''National Defense Industrial Resources Preparedness''), is amended by:

(a) striking ''The Director, Federal Emergency Management Agency (''Director, FEMA'')'' in section 104(b) and inserting ''The Secretary of Homeland Security (''the Secretary'')'' in lieu thereof;

(b) striking ''The Director, FEMA,'' in sections 201(c) and 601(f) and inserting ''The Secretary'' in lieu thereof;

(c) striking ''the Director, FEMA,'' wherever it appears in sections 201(e), 202(c), 305, 501, 701(e), and 802(e), and inserting ''the Secretary'' in lieu thereof; and

(d) inserting ''the Department of Homeland Security,'' after ''Attorney General,'' in section 801.

Sec. 25. Executive Order 12906 of April 11, 1994 (''Coordinating Geographic Data Acquisition and Access: The National Spatial Data Infrastructure''), is amended by:

(a) striking ''and'' in section 7(b)(ii);

(b) striking the period at the end of section 7(b)(iii) and inserting ''; and'' in lieu thereof; and

(c) inserting a new section 7(b)(iv) to read ''(iv) the national security-related activities of the Department of Homeland Security as determined by the Secretary of Homeland Security.''.

Sec. 26. Executive Order 12870 of September 30, 1993 (''Trade Promotion Coordinating Committee''), is amended by:

(a) inserting ''(j) Department of Homeland Security;'' after ''(i) Department of the Interior;'' in section 1; and

(b) relettering the subsequent subsections in section 1 appropriately.

Sec. 27. Executive Order 12835 of January 25, 1993 (''Establishment of the National Economic Council''), is amended by:

(a) inserting ''(k) Secretary of Homeland Security;'' after ''(j) Secretary of Energy;'' in section 2; and

(b) relettering the subsequent subsections in section 2 appropriately.

Sec. 28. Executive Order 12830 of January 9, 1993 (''Establishing the Military Outstanding Volunteer Service Medal''), is amended by striking ''the Secretary of Transportation'' wherever it appears and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 29. Executive Order 12824 of December 7, 1992 (''Establishing the Transportation Distinguished Service Medal''), is amended by:

(a) striking ''Transportation'' in the title and inserting ''Homeland Security'' in lieu thereof; and

(b) striking ''Transportation'' wherever it appears and inserting ''Homeland Security'' in lieu thereof.

Sec. 30. Executive Order 12807 of May 24, 1992 (''Interdiction of Illegal Aliens''), is amended by striking ''the Attorney General'' in section 2(c)(3) and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 31. Executive Order 12793 of March 20, 1992 (''Continuing the Presidential Service Certificate and Presidential Service Badge''), is amended by striking ''the Secretary of Transportation'' in section 1 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 32. Executive Order 12789 of February 10, 1992 (''Delegation of Reporting Functions Under the Immigration Reform and Control Act of 1986''), is amended by striking ''The Attorney General'' in section 1 and inserting ''The Secretary of Homeland Security'' in lieu thereof.

Sec. 33. Executive Order 12788 of January 15, 1992 (''Defense Economic Adjustment Program''), is amended by:

(a) inserting ''(15) Secretary of Homeland Security;'' after ''(14) Secretary of Veterans Affairs;'' in section 4(a); and

(b) renumbering the subsequent subsections in section 4(a) appropriately.

Sec. 34. Executive Order 12777 of October 18, 1991 (''Implementation of Section 311 of the Federal Water Pollution Control Act of October 18, 1972, as Amended, and the Oil Pollution Act of 1990''), is amended by:

(a) inserting ''and the Secretary of the Department in which the Coast Guard is operating'' after ''the Secretary of Transportation'' in sections 2(b)(2) and 2(d)(2);

(b) striking ''the Secretary of Transportation'' in section 2(e)(2) and wherever it appears in sections 5 and 8 and inserting ''the Secretary of the Department in which the Coast Guard is operating'' in lieu thereof; and

(c) inserting ''the Secretary of the Department in which the Coast Guard is operating,'' after ''Agriculture,'' in section 10(c).

Sec. 35. Executive Order 12743 of January 18, 1991 (''Ordering the Ready Reserve of the Armed Forces to Active Duty''), is amended by:

(a) striking ''the Department of Transportation'' in section 1 and inserting ''the Department of Homeland Security'' in lieu thereof; and

(b) striking ''the Secretary of Transportation'' in section 1 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 36. Executive Order 12742 of January 8, 1991 (''National Security Industrial Responsiveness''), is amended by:

(a) inserting ''Homeland Security,'' after ''Transportation,'' in section 104(a); and

(b) striking ''the Director of the Federal Emergency Management Agency'' in section 104(d) and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 37. Executive Order 12733 of November 13, 1990 (''Authorizing the Extension of the Period of Active Duty of Personnel of the Selected Reserve of the Armed Forces''), is amended by striking ''the Secretary of Transportation'' and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 38. Executive Order 12728 of August 22, 1990 (''Delegating the President's Authority to Suspend any Provision of Law Relating to the Promotion, Retirement, or Separation of Members of the Armed Forces''), is amended by striking ''the Secretary of Transportation'' in sections 1 and 2 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 39. Executive Order 12727 of August 27, 1990 (''Ordering the Selected Reserve of the Armed Forces to Active Duty''), is amended by striking ''the Secretary of Transportation'' in section 1 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 40. Executive Order 12699 (''Seismic Safety of Federal and Federally Assisted or Regulated New Building Construction''), is amended by:

(a) striking ''Federal Emergency Management Agency (FEMA)'' in section 3(d) and inserting ''Department of Homeland Security'' in lieu thereof;

(b) striking ''The Director of the Federal Emergency Management Agency'' in section 4(a) and inserting ''The Secretary of Homeland Security'' in lieu thereof; and

(c) striking ''The Federal Emergency Management Agency'' and ''The FEMA'' in section 5 and inserting ''The Department of Homeland Security'' in lieu thereof (in both places).

Sec. 41. Executive Order 12657 of November 18, 1988 (''Federal Emergency Management Agency Assistance in Emergency Preparedness Planning at Commercial Nuclear Power Plants''), is amended by:

(a) striking ''Federal Emergency Management Agency'' in the title and inserting ''Department of Homeland Security'' in lieu thereof;

(b) striking ''Federal Emergency Management Agency (''FEMA'')'' in section 1(b) and inserting ''Department of Homeland Security (''DHS'')'' in lieu thereof;

(c) striking ''FEMA'' wherever it appears in sections 1(b), 2(b), 2(c), 3, 4, 5, and 6, and inserting ''DHS'' in lieu thereof; and

(d) striking ''the Director of FEMA'' in section 2(a) and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 42. Executive Order 12656 of November 18, 1988 (''Assignment of Emergency Preparedness Responsibilities''), as amended, is further amended by:

(a) striking ''The Director of the Federal Emergency Management Agency'' wherever it appears in sections 104(c) and 1702 and inserting ''The Secretary of Homeland Security'' in lieu thereof;

(b) striking ''the Director of the Federal Emergency Management Agency'' wherever it appears in sections 104(c), 201(15), 301(9), 401(10), 501(4), 501(7), 502(7), 601(3), 701(5), 801(9), 1302(4), 1401(4), 1701, and 1801(b), and inserting ''the Secretary of Homeland Security'' in lieu thereof;

(c) striking ''consistent with current National Security Council guidelines and policies'' in section 201(15) and inserting ''consistent with current Presidential guidelines and policies'' in lieu thereof;

(d) striking ''Secretary'' in section 501(9) and inserting ''Secretaries'' in lieu thereof;

(e) inserting ''and Homeland Security'' after ''Labor'' in section 501(9);

(f) striking ''and'' after ''State'' in section 701(6) and inserting a comma in lieu thereof;

(g) inserting '', and Homeland Security'' after ''Defense'' in section 701(6);

(h) striking ''the Director of the Federal Emergency Management Agency,'' in section 701(6); and

(i) striking ''Federal Emergency Management Agency'' in the title of Part 17 and inserting ''Department of Homeland Security'' in lieu thereof.

Without prejudice to subsections (a) through (i) of this section, all responsibilities assigned to specific Federal officials pursuant to Executive Order 12656 that are substantially the same as any responsibility assigned to, or function transferred to, the Secretary of Homeland Security pursuant to the Homeland Security Act of 2002 (regardless of whether such responsibility or function is expressly required to be carried out through another official of the Department of Homeland Security or not pursuant to such Act), or intended or required to be carried out by an agency or an agency component transferred to the Department of Homeland Security pursuant to such Act, are hereby reassigned to the Secretary of Homeland Security.

Sec. 43. Executive Order 12580 of January 23, 1987 (''Superfund Implementation''), as amended, is further amended by:

(a) inserting ''Department of Homeland Security,'' after Department of Energy,'' in section 1(a)(2); and

(b) striking ''Federal Emergency Management Agency'' in section 1(a)(2).

Sec. 44. Executive Order 12555 of November 15, 1985 (''Protection of Cultural Property''), as amended, is further amended by:

(a) striking ''the Secretary of the Treasury'' in sections 1, 2, and 3, and inserting ''the Secretary of Homeland Security'' in lieu thereof; and

(b) striking ''The Department of the Treasury'' in the heading of section 3 and inserting ''The Department of Homeland Security'' in lieu thereof.

Sec. 45. Executive Order 12501 of January 28, 1985 (''Arctic Research''), is amended by:

(a) inserting ''(i) Department of Homeland Security;'' after ''(h) Department of Health and Human Services;'' in section 8; and

(b) relettering the subsequent subsections in section 8 appropriately.

Sec. 46. Executive Order 12472 of April 3, 1984 (''Assignment of National Security and Emergency Preparedness Telecommunications Functions''), is amended by:

(a) inserting ''the Homeland Security Council,'' after ''National Security Council,'' in sections 1(b), 1(e)(4), 1(f)(3), and 2(c)(4);

(b) striking ''The Secretary of Defense'' in section 1(e) and inserting ''The Secretary of Homeland Security'' in lieu thereof;

(c) striking ''Federal Emergency Management Agency'' in sections 1(e)(3) and 3(j) and inserting ''Department of Homeland Security'' in lieu thereof;

(d) inserting '', in consultation with the Homeland Security Council,'' after ''National Security Council'' in section 2(b)(1);

(e) inserting '', the Homeland Security Council,'' after ''National Security Council'' in sections 2(d) and 2(e);

(f) striking ''the Director of the Federal Emergency Management Agency'' in section 2(d)(1) and inserting ''the Secretary of Homeland Security'' in lieu thereof;

(g) striking ''Federal Emergency Management Agency. The Director of the Federal Emergency Management Agency shall:'' in section 3(b) and inserting ''Department of Homeland Security. The Secretary of Homeland Security shall:'' in lieu thereof; and

(h) adding at the end of section 3(d) the following new paragraph: ''(3) Nothing in this order shall be construed to impair or otherwise affect the

authority of the Secretary of Defense with respect to the Department of Defense, including the chain of command for the armed forces of the United States under section 162(b) of title 10, United States Code, and the authority of the Secretary of Defense with respect to the Department of Defense under section 113(b) of that title.''.

Sec. 47. Executive Order 12382 of September 13, 1982 (''President's National Security Telecommunications Advisory Committee''), as amended, is further amended by:

(a) inserting ''through the Secretary of Homeland Security,'' after ''the President,'' in sections 2(a) and 2(b);

(b) striking ''and to the Secretary of Defense'' in section 2(e) and inserting '', through the Secretary of Homeland Security,'' in lieu thereof; and

(c) striking ''the Secretary of Defense'' in sections 3(c) and 4(a) and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 48. Executive Order 12341 of January 21, 1982 (''Cuban and Haitian Entrants''), is amended by:

(a) striking ''The Attorney General'' in section 2 and inserting ''The Secretary of Homeland Security'' in lieu thereof; and

(b) striking ''the Attorney General'' in section 2 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 49. Executive Order 12208 of April 15, 1980 (''Consultations on the Admission of Refugees''), as amended, is further amended by:

(a) striking ''the following functions: (a) To'' in section 1–101 and inserting ''to'' in lieu thereof;

(b) striking ''the Attorney General'' in section 1–101(a) and inserting ''the Secretary of Homeland Security'' in lieu thereof;

(c) striking sections 1–101(b) and 1–102; and

(d) redesignating sections 1–103 and 1–104 as sections 1–102 and 1–103, respectively.

Sec. 50. Executive Order 12188 of January 2, 1980 (''International Trade Functions''), as amended, is further amended by:

(a) inserting ''(12) The Secretary of Homeland Security'' after ''(11) The Secretary of Energy'' in section 1–102(b); and

(b) renumbering the subsequent subsections in section 1–102(b) appropriately.

Sec. 51. Executive Order 12160 of September 26, 1979 (''Providing for Enhancement and Coordination of Federal Consumer Programs''), as amended, is further amended by:

(a) inserting ''(m) Department of Homeland Security.'' after ''(l) Department of the Treasury.'' in section 1–102;

(b) striking ''(s) Federal Emergency Management Agency.'' in section 1–102; and

(c) relettering the subsequent subsections in section 1–102 appropriately.

Sec. 52. Executive Order 12148 of July 20, 1979 (''Federal Emergency Management''), as amended, is further amended by:

(a) striking ''the Federal Emergency Management Agency'' whenever it appears and inserting ''the Department of Homeland Security'' in lieu thereof; and

(b) striking ''the Director of the Federal Emergency Management Agency'' wherever it appears and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 53. Executive Order 12146 of July 18, 1979 (''Management of Federal Legal Resources''), as amended, is further amended by:

(a) striking ''15'' in section 1–101 and inserting ''16'' in lieu thereof;

(b) inserting ''(n) The Department of Homeland Security.'' after ''(m) The Department of the Treasury.'' in section 1–102; and

(c) relettering the subsequent subsections in section 1–102 appropriately.

Sec. 54. Executive Order 12002 of July 7, 1977 (''Administration of Export Controls''), as amended, is further amended by inserting '', the Secretary of Homeland Security,'' after ''The Secretary of Energy'' in section 3.

Sec. 55. Executive Order 11965 of January 19, 1977 (''Establishing the Humanitarian Service Medal''), is amended by striking ''the Secretary of Transportation'' wherever it appears in sections 1, 2, and 4, and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 56. Executive Order 11926 of July 19, 1976 (''The Vice Presidential Service Badge''), is amended by striking ''the Secretary of Transportation'' in section 2 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 57. Executive Order 11858 of May 7, 1975 (''Foreign Investment in the United States''), as amended, is further amended by:

(a) inserting ''(8) The Secretary of Homeland Security.'' after ''(7) The Attorney General.'' in section 1(a); and

(b) redesignating subsection (8) as subsection (9) in section 1(a).

Sec. 58. Executive Order 11800 of August 17, 1974 (''Delegating Certain Authority Vested in the President by the Aviation Career Incentive Act of 1974''), as amended, is further amended by striking ''the Secretary of Transportation'' in section 1 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 59. Executive Order 11645 of February 8, 1972 (''Authority of the Secretary of Transportation to Prescribe Certain Regulations Relating to Coast Guard Housing''), is amended by striking ''the Secretary of Transportation'' in the title and in sections 1 and 2 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 60. Executive Order 11623 of October 12, 1971 (''Delegating to the Director of Selective Service Authority to Issue Rules and Regulations under the Military Selective Service Act''), as amended, is further amended by:

(a) striking ''the Secretary of Transportation'' in section 2(a) and inserting ''the Secretary of Homeland Security'' in lieu thereof; and

(b) striking ''the Department of Transportation'' in section 2(a) and inserting ''the Department of Homeland Security'' in lieu thereof.

Sec. 61. Executive Order 11448 of January 16, 1969 (''Establishing the Meritorious Service Medal''), as amended, is further amended by striking ''the Secretary of Transportation'' in section 1 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 62. Executive Order 11446 of January 16, 1969 (''Authorizing the Acceptance of Service Medals and Ribbons from Multilateral Organizations Other Than the United Nations''), is amended by striking ''the Secretary of Transportation'' and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 63. Executive Order 11438 of December 3, 1968 (''Prescribing Procedures Governing Interdepartmental Cash Awards to the Members of the Armed Forces''), as amended, is further amended by:

(a) striking ''the Secretary of Transportation'' in sections 1 and 2 and inserting ''the Secretary of Homeland Security'' in lieu thereof; and

(b) striking ''the Department of Transportation'' wherever it appears in sections 2 and 4 and inserting ''the Department of Homeland Security'' in lieu thereof.

Sec. 64. Executive Order 11366 of August 4, 1967 (''Assigning Authority to Order Certain Persons in the Ready Reserve to Active Duty''), is amended by striking ''The Secretary of Transportation'' in sections 2 and 3(b) and inserting ''The Secretary of Homeland Security'' in lieu thereof.

Sec. 65. Executive Order 11239 of July 31, 1965 (''Enforcement of the Convention for Safety of Life at Sea, 1960''), as amended, is further amended,

without prejudice to section 1–106 of Executive Order 12234 of September 3, 1980 (''Enforcement of the Convention for the Safety of Life at Sea''), by:

(a) striking ''the Secretary of Transportation'' in sections 1, 3, and 4, and inserting ''the Secretary of Homeland Security'' in lieu thereof; and

(b) striking ''The Secretary of Transportation'' in sections 2 and 3 and inserting ''The Secretary of Homeland Security'' in lieu thereof.

Sec. 66. Executive Order 11231 of July 8, 1965 (''Establishing the Vietnam Service Medal''), as amended, is further amended by striking ''the Secretary of Transportation'' in section 1 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 67. Executive Order 11190 of December 29, 1964 (''Providing for the Screening of the Ready Reserve of the Armed Forces''), as amended, is further amended by striking ''the Secretary of Transportation'' in section 1 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 68. Executive Order 11139 of January 7, 1964 (''Authorizing Acceptance of the United Nations Medal and Service Ribbon''), is amended by striking ''the Secretary of the Treasury'' and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 69. Executive Order 11079 of January 25, 1963 (''Providing for the Prescribing of Regulations under which Members of the Armed Forces and Others May Accept Fellowships, Scholarships or Grants''), as amended, is further amended by striking ''the Secretary of Transportation'' and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 70. Executive Order 11046 of August 24, 1962 (''Authorizing Award of the Bronze Star Medal''), as amended, is further amended by striking ''the Secretary of Transportation'' in section 1 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 71. Executive Order 11016 of April 25, 1962 (''Authorizing Award of the Purple Heart''), as amended, is further amended by striking ''the Secretary of Transportation'' in sections 1 and 2 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 72. Executive Order 10977 of December 4, 1961 (''Establishing the Armed Forces Expeditionary Medal''), as amended, is further amended by striking ''the Secretary of Transportation'' in section 2 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 73. Executive Order 10789 of November 14, 1958 (''Authorizing Agencies of the Government To Exercise Certain Contracting Authority in Connection With National-Defense Functions and Prescribing Regulations Governing the Exercise of Such Authority''), as amended, is further amended by:

(a) striking ''The Federal Emergency Management Agency'' in paragraph 21 and inserting ''Department of Homeland Security'' in lieu thereof; and

(b) inserting at the end thereof the following new Part:

''Part III—Coordination with Other Authorities

25. After March 1, 2003, no executive department or agency shall exercise authority granted under paragraph 1A of this order with respect to any matter that has been, or could be, designated by the Secretary of Homeland Security as a qualified anti-terrorism technology as defined in section 865 of the Homeland Security Act of 2002, unless—

(a) in the case of the Department of Defense, the Secretary of Defense has, after consideration of the authority provided under subtitle G of title VIII of the Homeland Security Act of 2002, determined that the exercise of authority under this order is necessary for the timely and effective conduct of United States military or intelligence activities; and

(b) in the case of any other executive department or agency that has authority under this order, (i) the Secretary of Homeland Security has advised whether the use of the authority provided under subtitle G of title VIII

of the Homeland Security Act of 2002 would be appropriate, and (ii) the Director of the Office and Management and Budget has approved the exercise of authority under this order.''.

Sec. 74. Executive Order 10694 of January 10, 1957 (''Authorizing the Secretaries of the Army, Navy, and Air Force to Issue Citations in the Name of the President of the United States to Military and Naval Units for Outstanding Performance in Action''), is amended by adding at the end thereof the following new section: ''5. The Secretary of the Department in which the Coast Guard is operating may exercise the same authority with respect to the Coast Guard under this order as the Secretary of the Navy may exercise with respect to the Navy and the Marine Corps under this order.''.

Sec. 75. Executive Order 10637 of September 16, 1955 (''Delegating to the Secretary of the Treasury Certain Functions of the President Relating to the United States Coast Guard''), is amended by:

(a) striking ''The Secretary of the Treasury'' in sections 1 and 2 and inserting ''The Secretary of Homeland Security'' in lieu thereof;

(b) striking ''the Secretary of the Treasury'' in the title and in subsections 1(j), 1(k), and 5, and inserting ''the Secretary of Homeland Security'' in lieu thereof; and

(c) striking subsection 1(r) and redesignating subsection 1(s) as subsection 1(r).

Sec. 76. Executive Order 10631 of August 17, 1955 (''Code of Conduct for Members of the Armed Forces of the United States''), as amended, is further amended by: striking ''the Secretary of Transportation'' and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 77. Executive Order 10554 of August 18, 1954 (''Delegating the Authority of the President to Prescribe Regulations Authorizing Occasions Upon Which the Uniform May Be Worn by Persons Who Have Served Honorably in the Armed Forces in Time of War''), is amended by striking ''the Secretary of the Treasury'' and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 78. Executive Order 10499 of November 4, 1953 (''Delegating Functions Conferred Upon the President by Section 8 of the Uniformed Services Contingency Option Act of 1953''), as amended, is further amended by striking ''the Treasury'' in sections 1 and 2 and inserting ''Homeland Security'' in lieu thereof.

Sec. 79. Executive Order 10448 of April 22, 1953 (''Authorizing the National Defense Medal''), as amended, is further amended by striking ''the Secretary of Transportation'' in sections 1 and 2 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 80. Executive Order 10271 of July 7, 1951 (''Delegating the Authority of the President to Order Members and Units of Reserve Components of the Armed Forces into Active Federal service''), is amended by striking ''the Secretary of the Treasury'' and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 81. Executive Order 10179 of November 8, 1950 (''Establishing the Korean Service Medal''), as amended, is further amended by striking ''the Secretary of the Treasury'' in sections 1 and 2 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 82. Executive Order 10163 of September 25, 1950 (''The Armed Forces Reserve Medal''), as amended, is further amended by striking ''the Secretary of the Treasury'' in sections 2 and 7 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 83. Executive Order 10113 of February 24, 1950 (''Delegating the Authority of the President to Prescribe Clothing Allowances, and Cash Allowances in lieu thereof, for Enlisted Men in the Armed Forces''), as amended, is further amended by striking ''the Secretary of the Treasury'' in sections 1 and 2 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 84. Executive Order 4601 of March 1, 1927 (''Distinguished Flying Cross''), as amended, is further amended by:

(a) striking ''The Secretary of War, the Secretary of the Navy,'' in sections 2 and 12 and inserting ''The Secretary of Defense'' in lieu thereof; and

(b) striking ''the Secretary of the Treasury'' in sections 2 and 12 and inserting ''the Secretary of Homeland Security'' in lieu thereof.

Sec. 85. *Designation as a Defense Agency of the United States.*

I hereby designate the Department of Homeland Security as a defense agency of the United States for the purposes of chapter 17 of title 35 of the United States Code.

Sec. 86. *Exception from the Provisions of the Government Employees Training Act.*

Those elements of the Department of Homeland Security that are supervised by the Under Secretary of Homeland Security for Information Analysis and Infrastructure Protection through the Department's Assistant Secretary for Information Analysis are, pursuant to section 4102(b)(1) of title 5, United States Code, and in the public interest, excepted from the following provisions of the Government Employees Training Act as codified in title 5: sections 4103(a)(1), 4108, 4115, 4117, and 4118, and that part of 4109(a) that provides ''under the regulations prescribed under section 4118(a)(8) of this title and''.

Sec. 87. *Functions of Certain Officials in the Coast Guard.*

The Commandant and the Assistant Commandant for Intelligence of the Coast Guard each shall be considered a ''Senior Official of the Intelligence Community'' for purposes of Executive Order 12333 of December 4, 1981, and all other relevant authorities.

Sec. 88. *Order of Succession.*

Subject to the provisions of subsection (b) of this section, the officers named in subsection (a) of this section, in the order listed, shall act as, and perform the functions and duties of, the office of Secretary of Homeland Security (''Secretary'') during any period in which the Secretary has died, resigned, or otherwise become unable to perform the functions and duties of the office of Secretary.

(a) Order of Succession.

(i) Deputy Secretary of Homeland Security;

(ii) Under Secretary for Border and Transportation Security;

(iii) Under Secretary for Emergency Preparedness and Response;

(iv) Under Secretary for Information Analysis and Infrastructure Protection;

(v) Under Secretary for Management;

(vi) Under Secretary for Science and Technology;

(vii) General Counsel; and

(viii) Assistant Secretaries in the Department in the order of their date of appointment as such.

(b) Exceptions.

(i) No individual who is serving in an office listed in subsection (a) in an acting capacity shall act as Secretary pursuant to this section.

(ii) Notwithstanding the provisions of this section, the President retains discretion, to the extent permitted by the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.*, to depart from this order in designating an acting Secretary.

Sec. 89. *Savings Provision.*

Except as otherwise specifically provided above or in Executive Order 13284 of January 23, 2003 (''Amendment of Executive Orders, and Other Actions, in Connection With the Establishment of the Department of Homeland Security''), references in any prior Executive Order relating to an agency or

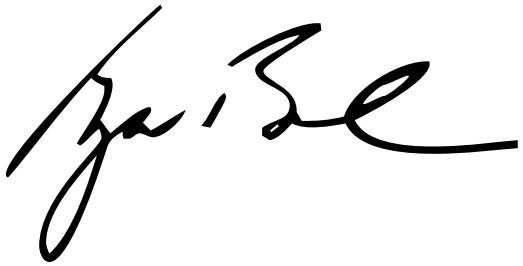
an agency component that is transferred to the Department of Homeland Security (''the Department''), or relating to a function that is transferred to the Secretary of Homeland Security, shall be deemed to refer, as appropriate, to the Department or its officers, employees, agents, organizational units, or functions.

Sec. 90. Nothing in this order shall be construed to impair or otherwise affect the authority of the Secretary of Defense with respect to the Department of Defense, including the chain of command for the armed forces of the United States under section 162(b) of title 10, United States Code, and the authority of the Secretary of Defense with respect to the Department of Defense under section 113(b) of that title.

Sec. 91. Nothing in this order shall be construed to limit or restrict the authorities of the Central Intelligence Agency and the Director of Central Intelligence pursuant to the National Security Act of 1947 and the CIA Act of 1949.

Sec. 92. This order shall become effective on March 1, 2003.

Sec. 93. This order does not create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.



THE WHITE HOUSE,
February 28, 2003.

[FR Doc. 03–5343
Filed 3–4–03; 8:45 am]
Billing code 3195–01–P

Attachment 8

A memo from CIS stating that it may want to be but is not bound by any approvals it may already have given. Every case is reviewed de novo each time.

U.S. Department of Homeland Security
20 Mass Ave, NW
Washington, DC 20536

U.S. Citizenship and Immigration Services

HQOPRD 72/11.3

Interoffice Memorandum

To: Service Center Directors
Regional Directors

From: William R. Yates
Associate Director for Operations

Date: APR 23 2004

Re: The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity.

Purpose

This memorandum provides guidance on the process by which an adjudicator, during adjudication of a subsequent request for petition extension, may question another adjudicator's prior approval of the nonimmigrant petition where there is no material change in the underlying facts.

Authority

CIS has the authority to question prior determinations. Adjudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. *See* 8 CFR § 103.8(d). However, because a recent review of CIS practices has shown that in certain instances, adjudicators have been questioning prior determinations where there is no material change in the underlying facts as a matter of routine, the below policy is being set forth.

Policy

In matters relating to an extension of nonimmigrant petition validity involving the same parties (petitioner and beneficiary) and the same underlying facts, a prior determination by an adjudicator that the alien is eligible for the particular nonimmigrant classification sought should be given deference. A case where a prior approval of the petition need not be given deference includes where: (1) it is determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material

information that adversely impacts the petitioner's or beneficiary's eligibility.[1] Material error, changed circumstances, or new material information must be clearly articulated in the resulting request for evidence or decision denying the benefit sought, as appropriate.

It is important to note, this memorandum does not in any way restrict or impact an adjudicator's ability to deny, in the exercise of his or her discretion, the beneficiary's simultaneous request to extend his or her stay in the United States in the same classification. *See* 8 CFR § 214.1(c)(5). In other words, even where an applicant or petitioner continues to demonstrate eligibility for the nonimmigrant classification, an adjudicator may determine that sufficient reason exists (such as inadmissibility factors or failure to maintain status) to warrant requiring the beneficiary to apply for a new visa at a U.S. consulate abroad prior to being allowed to continue in the same classification. This "split" decision process may result in approval of the petition for the same classification where the petitioner and the beneficiary relationship has not changed, and simultaneous discretionary denial of the beneficiary's extension of stay request.

Adjudicators continue to have full discretion to revoke approval of a petition in cases where fraud or misrepresentation is found. Likewise, the basis of any regulatory ground of revocation remains in effect.

Explanation of Terms

A *material error* involves the misapplication of an objective statutory or regulatory requirement to the facts at hand. An example of the misapplication of the pertinent law or regulation is, but is not limited to, an H-1B petition approval where the beneficiary's degree is not appropriate for the proffered occupation. Generally, adjudicators should not question prior adjudicators' determinations that are subjective, such as the prior adjudicator's evaluation of the beneficiary's education, specialized training, and/or progressively responsible experience in a degree equivalency determination.

A *substantial change in circumstances* involves any material change to either the petitioner's or the beneficiary's eligibility for the nonimmigrant classification sought. Specific examples include, but are not limited to, the following:

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[1] This memorandum does not cover petitions, or extensions of petition validity, or any other non-immigrant cases, where the initial approval is granted to allow the petitioner and/or beneficiary to effectuate a tentative or prospective business plan or otherwise prospectively satisfy the requirements for the nonimmigrant classification. Nonimmigrant cases of this type include the treaty investor classification, which may require a petitioner to be actively in the process of investing a substantial amount of capital in a *bona fide* enterprise, and the L-1 "new office" extension petitions. The regulation at 8 CFR § 214.2(l)(3)(v)(C) allows an L-1 "new office" one year from the date of the initial approval to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the petitioner's business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension of the visa's validity.

- In the L classification, a change in the corporate relationship requires a new determination that the foreign and US entities continue to meet the definition of a qualifying relationship. *See* 8 CFR § 214.2(l)(1)(ii)(G);

- In the L classification, a change in the nature of the beneficiary's employment, such as a change in the beneficiary's job duties, a change from a specialized knowledge to a managerial or executive position, or a change in the organizational structure of the petitioning company, requires a new determination that the beneficiary continues to be employed in a qualifying managerial, executive, or specialized knowledge capacity.

- In the H classification involving a beneficiary's temporary licensure, a new review is necessary to ensure that the beneficiary has either obtained a permanent license in the state of intended employment or continues to hold a temporary license valid in the same state for the period of the requested extension. *See* 8 CFR § 214.2(h)(4)(v)(E);

- In the H classification, a move of the beneficiary's employer outside of the United States requires a new determination to see whether the petitioner meets the definition of "United States employer" at 8 CFR § 214.2(h)(4)(ii), or whether the petitioner is an agent and, therefore, has met the documentary requirements at 8 CFR § 214.2(h)(2)(F); and,

- In the P classification, entertainment groups in which 75% of the members have not been performing entertainment services for the group for a minimum of one year are ineligible for such classification.

New material information means any fact not available to the previous adjudicator that would impact the petitioner's or beneficiary's eligibility for the nonimmigrant classification sought. Examples of new material information include, but are not limited to, information that affects national security or public safety, garnered from security checks conducted on beneficiaries and petitioners.

Review by Deputy Center Director

As stated above, a material error, a substantial change in circumstances, or new material information must be clearly articulated in a request for evidence or decision denying the benefit. The Deputy Center Director (or designated Acting Deputy Center Director in situations where the Deputy Center Director is absent) should review and clear in writing, prior to the issuance of an RFE or final decision, any case involving an extension of stay of petition validity in a nonimmigrant classification where the parties and facts involved have not changed, but where the current adjudicating officer determines nonetheless that it is necessary to issue an RFE or deny the application for extension of petition validity.

These cases shall be referred through the center's supervisory channel to the Deputy Center Director for review. Evaluation of this practice may be conducted after 90 days from the date of this memorandum.

Notice

This memorandum is intended solely for guiding USCIS personnel in performance of their professional duties. It is not intended to be, and may not be relied upon, to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Attachment 9

8 USC § 1252

We cannot sue the CIS on any issues left to their discretion. The only exceptions are for issues of constitutional law and issues of law, which may be reviewed only by the courts of appeal.

8 U.S.C.A. § 1252

§ 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1) of this title

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review--
(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,
(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,
(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or
(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--
(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

