U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 22 December 2010

CASE NO.: 2010-LCA-00023

In the Matter of

ADMINISTRATOR, WAGE AND HOUR DIVISION,
Prosecuting Party,

v.

CAMO TECHONOLOGIES, INC.,
Respondent.

Appearances:

Andrew Karonis, Esq.
For Prosecuting Party

William A. Stock, Esq.,
For Respondents

Before:

Janice K. Bullard
Administrative Law Judge

DECISION AND ORDER

This matter arises under the Immigration and Nationality Act H-1B visa program ("the Act" or "INA"), 8 U.S.C. § 1101 (a)(15)(H)(I)(b) and § 1182(n), and the implementing regulations found at 20 C.F.R. Part 655, Subparts H and I, 20 C.F.R. § 655.700 et seq.

I. INTRODUCTION

The Immigration and Nationality Act's ("INA") H-1B visa program permits American employers to temporarily employ non-immigrant aliens to perform specialized[1] jobs in the United States. 8 U.S.C. §1101(a)(15)(H)(i)(b). In order to protect U.S. workers and their wages from an influx of foreign workers, an employer must file a Labor Condition Application ("LCA") with the Department of Labor ("DOL") before an alien will be admitted to the United States as an H-1B non-immigrant worker. 8 U.S.C. §1182(n)(1). If a petition to hire temporary

[1] "Specialized occupation" is defined within the Act as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher (or fashion model). 8 U.S.C. §1184(i)(1).

non-immigrant workers is granted, the Employer is required to meet certain conditions regarding paying prevailing wages, keeping accurate records, and posting notice of the LCA and its contents.

CONTENTIONS OF THE PARTIES

1. The Administrator

The Prosecuting Party in this matter contends that Respondent is subject to civil money penalties for willfully failing to post notice of LCAs and for failing to retain required records.

2. Respondents

Respondents contend that any violation of posting regulations was not willful and does not warrant the assessment of civil money penalties. Respondents further contend that they maintained all required records and did not violate any statutory or regulatory mandate with respect to record keeping.

I. ISSUES

The issues presented in this case for resolution are:

1. Whether Respondent willfully violated the Act by failing to file LCAs for all work sites where non-immigrant employees were expected to perform work;
2. Whether Respondent willfully violated the Act by failing to properly maintain records;
3. Whether civil monetary penalties should be assessed; and
4. Whether Respondent should be denied the opportunity to participate in the H-1B visa program for at least two years.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. PROCEDURAL HISTORY

CamoTechnologies, Inc. ("Respondent"; "CTI") filed numerous LCAs with the Department of Labor ("DOL") to secure H-1B visas for non-immigrant employees to work in the field of computer programming. The H-1B visas were approved and the employees came to the United States, where they received assignments to work for clients of the Respondents, or for third party subcontractors. Upon a complaint charging improper payment of wages, the U.S. Department of Labor Wage and Hour Division ("the Administrator"; "WH") conducted an investigation into Respondent's H-1B visa practices, and concluded that it had failed to post required notices about hiring H-1B non-immigrant employees in a high percentage of instances in its non-immigrant workforce. Respondent was notified by a determination letter dated May 7, 2010 (JX1) that the Administrator had concluded that Respondent had willfully failed to post proper notice required, and had willfully failed to maintain proper records. The Administrator assessed a civil money penalty in the total amount of $192,625.00, and concluded that

Respondent should be debarred from the H1B visa program for a period of two years. On May 20, 2010, Respondent requested a hearing in the matter before the Office of Administrative Law Judges ("OALJ").

The case was assigned to me and by Notice issued May 27, 2010, I scheduled a hearing to commence on July 15, 2010 in Cranford, New Jersey. I rescheduled the hearing at the parties' joint request. The hearing commenced on September 8, 2010, at which time the parties appeared, represented by counsel. The parties submitted evidence that was admitted to the record, with the exception of AX-4, which I excluded as not relevant. Tr. at 57. Testimony was taken. Both parties filed closing written argument on December 17, 2010.

The record in this matter is closed. This decision[2] is based upon a thorough review of the evidence, both documentary and testamentary, as well as the arguments and pleadings of the parties.

B. STIPULATIONS OF FACT

The parties entered into stipulations[3] that I find are supported by the record, and accordingly, I adopt as findings herein the following stipulated facts:

1. Between September 27, 2006 and September 22, 2009, Camo Technologies, Inc. ("CTI") employed more than 51 full time employees in the United States, with its principal place of business located at 1480 Route 9 North, Suite 209, Woodbridge, NJ 07095.
2. At the time of the determination in this matter, CTI employed less than 51 full time employees in the United States.
3. Between September 27, 2006 and September 22, 2009, the 92 Labor Condition Applications (the "92 LCAs") for H-1B Non-Immigrant Workers identified on the list attached to the Determination Letter were filed by CTI and had been approved by the Department of Labor (the "92 LCAs"). With respect to the fifth LCA listed in the Determination Letter, the LCA No. is incorrectly designated as 1-07134-346171, whereas it should be designated as 1-07134-3456171
4. The H-1B workers sponsored by CTI in connection with the 92 LCAs were assigned to work at various locations throughout the country which were neither owned nor operated by CTI (hereinafter "Third Party Worksite").
5. The H-1B workers sponsored by CTI in connection with the 92 LCAs spent the majority of their working hours at Third Party Worksites.
6. At any given time between September 27, 2006 and September 22, 2009, over 15% of CTI's full time employees consisted of non-immigrant workers whom CTI sponsored for H-1B visas.
7. With the exception of LCA No. I 200-09204-758 186, CTI did not represent on the other 91 LCAs that they would be used to support H-1B petitions only for exempt non-immigrants.

---

[2] In this Decision and Order, the evidence shall be designated as follows: Prosecuting Party's (Administrator):"AX-#"; Employer's (Respondents) "RX-#". References to the transcript of the hearing shall be made to "Tr. at #".
[3] As used herein, the term Third Party Worksite includes both those worksites that are controlled by CTI's clients (the "Primary Client"), as well as worksites controlled by the clients of CTI's Primary Clients (the "Secondary Clients").

8. Between September 27, 2006 and September 22, 2009, CTI did not place any of its sponsored H-1B workers at a Third Party Worksite without first determining that such placement would not displace any U.S. workers.
9. Between September 27, 2006 and September 22, 2009, CTI did not retain any documents showing the manner in which it determined that its placement of its sponsored H-1B workers at a Third Party Worksite would not displace U.S. workers.
10. The occupational classifications designated on the 92 LCAS were for computer programmers, analysts, software engineers and related specialty occupations pertaining to the information technology industry.
11. In 1997, Ashwani Jasti founded Bit Tech, Inc. a/k/a BIT Technologies, Inc. ("BIT Tech").
12. Ashwani Jasti is the current president of CTI.
13. Between June 22, 2001 and December, 2001, BIT Tech maintained its principal place of business at 1480 Route 9 North, Suite 209, Woodbridge, NJ 07095.
14. Between June 22, 2001 and November *5*, 2001, Nalini Parsram, who may also have been referred to as Nalini Jasti, was employed by BIT Tech as its Business Development Director.
15. Between June 22, 2001 and November *5*, 2001, Sridhar Margan was employed as Manager, Accounts, and Anurag Sharma was employed as Manager, HR.
16. Between April 28, 2000 and June 22, 2001, BIT Tech authorized Anurag Sharma to prepare the LCAs prior to filing and to post one copy of the LCA at BIT Tech's office on BIT Tech's behalf.
17. On October 2, 2001, Sridhar Marghan advised John Warner by e-mail that Ms. Parsram was on maternity leave.
18. On or about October 12, 2001, representatives of BIT Tech met with Wage Hour Investigator John Warner in connection with WH's investigation of alleged violations of the H-1B regulations by BIT Tech (the "October 12, 2001 Meeting").
19. Ms. Parsram attended some or all of the October 12, 2001 Meeting.
20. On October 15, 2001, Mr. Warner sent an e-mail to Nalini Parsram, advising in relevant part as follows: *In accordance with Title 20, Code of Federal Regulations Part 655. 734(a)(1)(A), an H-1B employer is required to post the notice of the filing of an LCA Form 9035 in two or more conspicuous places so the workers in the occupational classification AT THE PLACES OF EMPLOYMENT can easily read or see the notice. This means, for example, that if you have consultants working at A T & T in Kansas City, Mo you must post the notice at A T & T In Missouri. Our Department's position is that an H-1B employer should not place workers with a client that balks at helping you meet this requirement. NONE of the notices you posted in one place at your office In Woodbridge meets your obligation to post the LCA under the statute. You should immediately make arrangements to post at all client workplaces in California, Colorado, Illinois, Iowa, New York, etc. There are civil money penalties and other sanctions for substantial failure to post the LCA. You are urged to document any efforts you made to retroactively comply with this obligation.*(capitalization in original)
21. On October 17, 2001, Sridhar Margan responded to Mr. Warner's email of October 15, 2001.
22. In his email response of October 17, 2001, Mr. Margan advised John Warner that BIT Tech would henceforth comply with the posting requirements of 20 C.F.R. § 655.734.
23. On November *5*, 2001, BIT Tech advised John Warner that it had posted notice of filing of the LCA at 60 third party worksites in 17 states.

24. In December of 2001, BIT Tech was acquired by CAMO, Inc. (the "Acquisition").
25. As a result of the Acquisition, BIT Tech changed its name to "Camo Technologies Inc., a division of CAMO, Inc."
26. On or about June 17, 2002, the Administrator issued a determination letter to BIT-Tech finding, *inter alia*, that BIT Tech failed to post notice of filing of the LCAs at all 60 worksites in 17 states where it placed its H-1B employees, in violation of 20 C.F.R. § 655.734 (the "2002 Determination Letter).
27. No civil money penalty was assessed to BIT Tech related to the failure to post notice of filing of the LCAs in the 2002 Determination Letter.
28. On or about July 2, 2002, the 2002 Determination Letter became a final order of the Secretary of Labor.
29. In August of 2005, Wage Hour Investigator Ronald Rehl notified CTI that it was being investigated for alleged violations of the H-1B regulations (the "2005 Investigation).
30. The violations that were investigated during the 2005 Investigation included (a) CTI's alleged failure to pay wages as required to one H-1B nonimmigrant, and (b) CTI's alleged failure to post notice of filing of the LCAs at all work locations.
31. CTI designated Ramesh Gurnani, Esq., as its representative for purposes of the 2005 Investigation.
32. On November 15, 2005, Ronald Rehl met with Mr. Gurnani in connection with the 2005 Investigation (the "November 15, 2005 Meeting").
33. During the time periods at issue during the 2005 Investigation, CTI authorized Anurag Sharma, Manager HR, to prepare the LCAS prior to filing, and to post notice of filing the LCAs at CTJ's office on behalf of CTJ.
34. On January 19, 2006, the Administrator issued a determination letter to CTI finding that CTI failed to pay wages as required and failed to provide notice of filings of the LCAS at each worksite where it placed its H-1B employees, in violation of 20 C.F.R. § 655.734 (the "2006 Determination Letter").
35. For the failure to pay the required wages, no civil money penalty was assessed. CTI had paid back wages in the amount of $20,750.03 to one H-1B non-immigrant. No civil money penalty was assessed to CTI related to the failure to post the notice of filings of the LCAS.
36. On or about February 4, 2006, the 2006 Determination Letter became a final order of the Secretary of Labor.
37. In March 2007, Nalini Parsram was appointed Vice President, HR and Administration, of CTI.
38. On March 4, 2010, Wage Hour Investigator Ronald Rehl met with Nalini Parsram and Ramesh Gurnani, Esq. to discuss alleged violations of the H-1B regulations by CTI (the "March 4, 2010 Meeting") that occurred after the 2006 Determination Letter became a final order.
39. Ms. Parsram and Mr. Gurnani were designated by CTI to represent it in connection with the investigation that is the subject of this hearing.
40. During the course of the entire investigation, CTI and its representatives cooperated fully and promptly in all aspects of the investigation.
41. During the March 4, 2010 Meeting, CTI, was asked by WH to describe its policy and procedure for posting notice of filing of LCAS at Third Party Worksites.
42. CTI advised Mr. Rehl that it would place H-1B employees at work sites owned and/or controlled by CTI's direct client (the "Primary Client").
43. In addition, CTI also provided H-1B employees to its Primary Clients, who in turn

assigned the H-1B employees to work at locations controlled by their clients (the "Secondary Clients").

44. Between September 27, 2006 and September 22, 2009, CTI's policy was to post a notice of filing of the LCA at two conspicuous locations at its offices, located at 1480 Route 9 North, Suite 209, Woodbridge, NJ 07095.

45. Between September 27, 2006 and September 22, 2009, in those situations where CTI's H-1B employee was to be placed at the Primary Client's worksite, CTI's policy was to ask its Primary Client for permission to post the LCA at the Primary Client's worksite.

46. Between September 27, 2006 and September 22, 2009, in those situations where CTI's H-1B employee was to be placed at Secondary Client's worksite, CTI's policy was to ask its Primary Client to contact the Secondary Client and to seek the Secondary Client's permission to post the LCA at the Secondary Client's worksite.

47. Between September 27, 2006 and September 22, 2009, in those situations where the Primary or Secondary Clients permitted CTI to post notice at their locations, CTI would send a copy of the LCA with the H-1B employee and instruct him/her to post the LCA in a conspicuous location at the Third Party Worksite on the day that the H-1B employee reported to work at that location.

48. Between September 27, 2006 and September 22, 2009, in those situations where the Primary or Secondary Clients refused to permit posting at their worksites, CTI would neither post the LCA nor any notice of filing of the LCA at the Third Party Worksite, but would nonetheless instruct its H-1B employees to report to work at those worksites.

49. Between September 27, 2006 and September 22, 2009, CTI used two forms to document posting of the notice of filing the LCA.

50. The first form indicated that CTI was filing a petition for an H-1B Non-Immigrant worker, setting forth, *inter alia*, the salary, position, and location of the petitioned employment (the "Office Posting Form").

51. The Office Posting Form further represented that the form was being posted for at least ten consecutive days at CTI's home office, located at 1480 Route 9 North, Suite 301,Woodbridge, NJ 07095. Examples of the Office Posting Form may be found in Joint Exhibit ("JX-") 4, page 6 of 8, and JX-5, page 6 of 8.

52. The second form indicated that CTI contacted the Primary or Secondary Client in connection with the anticipated placement of an H-1B employee to determine whether posting was permitted at the worksite (the "Third Party Worksite Posting Form".

53. The Third Party Worksite Posting Form indicated (1) the date such contact was made, (2) the name of the H-1B employee who would be assigned to work at the Third Party Worksite; (3) the name of the city and state where the Third Party Worksite was located; (4) the name of the individual from the Primary or Secondary Client whom CTI spoke with to determine whether posting at the Third Party Worksite was permitted; and (5) a box indicating whether CTI was permitted to post at the Third Party Worksite or not. Examples of the Third Party Worksite Form may be found in JX-4, page 8 of 8, and JX-5.

54. CTI did not provide notice of posting to U.S. workers at the Third Party Worksites by means of e-mail or electronically posting on the Primary or Secondary Client's intranet site, home page, electronic bulletin board, or electronic newsletter.

55. Between September 27, 2006 and September 22, 2009, CTI did not post an LCA or notice of the filing an LCA at Third Party Worksites with respect to 67 LCAs (the "67 Incidents"). A list of the 67 Incidents has been designated as JX-2.

56. With respect to each of the 67 Incidents, CTI produced Third Party Worksite Posting Forms confirming that the Primary or Secondary Clients would not allow posting at their worksite.
57. With respect to each of the 67 Incidents, CTI placed one or more H-1B employees at each of the Third Party Worksites after being advised that posting was not permitted.
58. With respect to each of the 67 Incidents, CTI permitted its H-1B employees to continue working at each of the Third Party Worksite even though neither the LCA nor notice of filing the LCA had been posted.
59. With respect to each of the 67 Incidents, CTI advised WH that it did not notify the U.S. employees at each of the Third Party Worksite that it had filed, or would be filing, an LCA for the purpose of placing an H-1B employee at the U.S. employee's worksite.
60. During the investigation, CTI advised WH that it believed its efforts to seek permission to post at a Third Party Worksite, and document such effort, was in compliance with the regulations.
61. During the March 4, 2010 meeting, Mr. Gurnani stated that, to his understanding, a petitioning employer may place an H-1B employee at a Third Party Worksite without posting notice of the LCA, provided that none of the petitioning employer's U.S. workers work at that Third Party Worksite.
62. Mr. Gurnani advised Mr. Rehl that there was legal support for Mr. Gurnani's understanding regarding posting requirements. Mr. Gurnani indicated that he would attempt to locate that support and provide Mr. Rehl with a copy or citation of the same.
63. Following the March 4, 2010 Meeting, Ronald Rehl again requested by e-mail that Mr. Gurnani provide WH with the legal authorities in support of his stated position. Exhibits JX-6 and JX-7 are true and correct copies of the e-mail exchanges between Messrs. Rehl and Gurnani relating to this issue.
64. On April 21, 2010, WH Investigator Ronald Rehl met with Ramesh Gurnani and Nilani Parsram to discuss the alleged H-1B violations that are the subject of this hearing (the "Final Conference").
65. At the Final Conference, Ronald Rehl advised Mr. Gurnani and Ms. Parsram that WH believed that CTI's posting policy as described violated 20 C.F.R. § 655.734, and that a violation of this regulation would be included in the Determination Letter.
66. At the Final Conference, Ronald Rehl advised Mr. Gurnani and Ms. Parsram that a maximum CMP of $5,000.00 for each failure to post could be assessed in the event that the failures to post were willful, and that CTI could be debarred for two years in the event of a willful failure to post, and one year in the event of a substantial failure to post.

C. DOCUMENTARY EVIDENCE

1. Joint Exhibits

JX-1 Administrator's Determination Letter dated May 7, 2010
JX-2 List of LCA's subject to determination letter
JX-3 Respondents' request for Hearing Before Office of Administrative Law Judge (OALJ) dated May 17, 2010
JX-4 Respondents' LCA signed on September 4, 2008 with posting notice
JX-5 Respondents' LCA signed on April 7, 2009 with posting notice

JX-6 E-mail correspondence between Ronald Rehl and Ramesh Gurnani, circa. mid-March, 2010
JX-7 E-mail correspondence between Ronald Rehl and Ramesh Gurnani, circa. early March, 2010
JX-8 Administrator's Determination of January 19, 2006
JX-9 E-mail correspondence between bit-technology and John Warner, circa. mid- October, 2001
JX-10 E--mail correspondence between bit-technology and John Warner, October 2, 2001
JX-11 Civil Money Penalty Computation Sheet
JX-12 Stipulations of Fact (detailed herein, supra.

2. Administrator's Evidence

AX-1 Determination Letter to Bit-Technology Inc. dated June 20, 2002
AX-2 Letter to Mr. Rehl from Ramesh Gurnani, Esq. dated September 27, 2005
AX-3 Copy of Business Card showing Nalini Jasti was Manager HR for Bit-Tech
AX-5 Memo to file regarding initial conference of April 13, 2005

3. Respondents' Evidence

RX-1 H-1 B Narrative Report of Ronald Rehl dated January 11, 2006
RX-2 H-1 B Narrative Report of John Warner dated June 13, 2002

D. FACTUAL BACKGROUND

1. Testimony of Ronald Rehl (Tr. at 22-102; 208-222)

Mr. Rehl has been the Regional Immigration Coordinator for the Northeast Region of the U.S. Department of Labor ("DOL") since 2009. He began working for DOL in June, 1997 as a Wage Hour ("WH") investigator. He had worked before that with the State of New Jersey for more than 20 years as an investigator. Following a complaint to the DOL, Mr. Rehl conducted an investigation into Respondent's activities regarding the hiring of H1-B non-immigrant workers that spanned from September 2006 until September of 2009.

Mr. Rehl's testimony verified the factual stipulations of the parties regarding his investigation. During the investigation, CTI was represented by Nalini Parsram and attorney Ramesh Gurnani. Those individuals met with Mr. Rehl on October 6, 2009, and the topic of posting was discussed. CTI provided documents that related to the posting. Mr. Rehl's review of the documents disclosed violations of Section 655.734 of the INA, and violations of record keeping requirement.

Mr. Rehl explained that Section 655.734 requires employers to post notice of their intent to hire non-immigrant employees at all work sites of the employees and to give a copy of the LCA to each H-1B employee. If employees are expected to work at a location controlled by a third party, the employer is required to give notice to a union representative, if available, or directly to the third party employer for posting. Rehl explained that the purpose of the notice

provision was to alert United States workers of the presence of non-immigrant workers. Posting should be made 30 days before the filing of an LCA in two obvious places at the work place, such as a Human Resources office or company bulletin board.

Rehl testified that employers can post on websites as well, but to constitute effective notice to third party workers, the site must encompass the third party company. In the alternative, an employer could email notice to third party United States workers. The posting must last for ten days, regardless of its form. If it is determined that a non-immigrant employee is expected to work at a location other than was identified in the LCA, employers are expected to post notice at the site of the employment when the employees begins to work.

Rehl explained that the LCA contains information about the number of non-immigrants expected to be employed, their wages, the duration of their employment, and advice to U.S. Workers or anyone else who may have a complaint about the LCA. Rehl testified that the notice requirements are integral to that segment of the H1-B visa program that is designed to protect American workers. Without the notice, U.S. workers would not know that a non-immigrant worker may be displacing them.

CTI explained to Rehl that its posting policy was to post in two locations at its office in Woodbridge. If a non-immigrant was expected to work at one of CTI's client locations, the company asked the client's permission to post or asked the intermediary subcontractor or placement company to speak to the end user client about posting. They did not post without permission, although the employee was dispatched to the job.

Rehl referred to CTI's documentation regarding posting, which supported his testimony. The documents supported his testimony, as they documented that CTI had asked for permission to post but were denied. CTI provided him with 92 packages of LCA documentation, and of those, 67 showed no posting had been permitted by third party clients. Nevertheless, all 67 non-immigrant workers were placed at the third party client work sites. Of the 92 employees represented by CTI's records, only three demonstrated that posting was done at a third party site.

CTI explained to Rehl that when clients gave them permission to post notice, they gave a copy of the LCA to the worker with instructions to see that it was posted at the work site. In other instances, CTI emailed the notice to the client. Mr. Rehl testified that the company advised that CTI had not attempted to post notice electronically. Rehl observed that CTI's LCAs listed a wide range of geographic locations, such as Iowa and Mississippi. He accorded the benefit of the doubt to Respondent and concluded that they knew where workers would be placed when the LCAs were filed.

Rehl considers the regulations provide no exceptions to the posting requirement. He accepted CTI's contention that it had posted notice at its headquarters in Woodbridge, New Jersey. However, Rehl believed that without posting, CTI should not have placed employees at a third party client site. By doing so, they violated the posting requirement. He did not consider this a technical violation of the Act, which is designed to protect American workers while helping Employers fill employment needs. He observed that the H-1B visa statute provides for stiff penalties for violators, such as the assessment of civil money penalties, and debarment from

participation.

Rehl recalled meeting with representatives of CTI on three occasions during his investigation. He held an initial conference at CTI's offices on October 6, 2009 with Nalini Parsram, who identified herself as CTI's Vice President, and the company's attorney, Ramesh Gurnani. At that time, Mr. Rehl was gathering information about the company's H-1B visa practices in the entirety, and he was provided with the 92 packages of documents regarding CTI's LCAs. He next met with the CTI representatives at its offices on March4, 2010. They discussed Mr. Rehl's findings that some employees may have been due back wages, and Mr. Rehl verified the accuracy of the information contained in the 92 packages that CTI had previously provided him. He discussed his findings regarding the posting deficiencies. He recalled that Mr. Gurnani advised him that he believed CTI was compliant with the posting requirements, citing to a DOL legal decision that he believed supported CTI's practices. Rehl asked for a copy of the decision, but it wasn't provided.

Rehl met again with the representatives for CTI on April 21, 2010. The meeting took place at DOL's District Office in Lawrenceville, New Jersey. DOL Assistant District Director Richard Galtro also attended the meeting. Mr. Rehl explained that at this final conference, he reviewed the issues involved in the investigation and discussed the period of employment, prevailing wage, and posting requirement. He explained that it was not enough to post at CTI's headquarters, and that the company was in violation of the Act unless they showed that the LCAs were posted at the actual work site for each non-immigrant worker. He explained how this could be accomplished electronically on web-sites or through e-mail. Mr. Rehl recalled that Mr. Gurnani believed that it was only a requirement to attempt to post at a third party employer. Mr. Gurnani explained that many large employers were reluctant to post notice. Mr. Rehl advised Mr. Gurnani that this position was not accurate, and further advised that he had cited CTI for violations of the Act and had assessed civil money penalties and recommended debarment.

Mr. Rehl had become acquainted with CTI before his 2009 investigation. He had conducted an investigation in 2005 and cited violations for failure to pay required wages and failure to post notice of LCAs at all locations where non-immigrants worked. The investigation disclosed that CTI had posted notice at its Woodbridge location, but not at third party locations. He recalled holding an initial conference with Mr. Gurnani and CTI's human resources coordinator Ira Gordon on April 13, 2005. He discussed posting requirements, and the representatives explained that they did not post at the actual client work locations.

Mr. Rehl testified that his point of contact for CTI during that investigation was Mr. Gurnani. Rehl and Gurnani met at the attorney's offices on November 15, 2005, and Mr. Rehl reviewed the posting requirements. Mr. Rehl did not recall the specifics of their conversation, but said that it was his practice to tell employers that they violated the Act if they do not post at the actual work site of employees. However, Mr. Rehl stated that CTI must have agreed to future compliance, or the investigation would have had a different outcome, including the potential assessment of civil money penalties (CMP). Mr. Rehl remembered telling Mr. Gurnani about the consequences of non-compliance, particularly if subsequent investigations revealed similar posting violations. Mr. Rehl testified that it was his practice to advise Employers that he was available to answer future questions about compliance with the Act. He spoke with Mr.

Gurnani on the telephone on December 15, 2005, and again reviewed the need to be compliant with posting requirements.

Mr. Rehl testified that CTI's predecessor company was called BIT Technologies ("BIT"). He was familiar with an investigation into that company conducted by Compliance Office John Warner that had found violations of the Act identified in a determination letter of June 20, 2002. When he began his investigation of CTI in 2005, he asked Mr. Gurnani to explain the company's relationship to BIT. Gurnani and Ashwany Jasti provided letters that explained that a company called CAMO, Inc. and acquired BIT in 2001 and shortly thereafter, the company's name was changed to CAMO Technologies. Mr. Rehl understood that the name change was the only substantive change to the operation and organization of BIT.

Mr. Rehl defined a willful violation of the Act as a knowing failure to comply, or reckless disregard of the law. He believed that CTI's failure to post notice at each site where a non-immigrant worker was located was willful. He noted that the company had been advised of the posting requirements in 2001 and 2002 when John Warner conducted investigations into BIT, and again in 2005 when Mr. Rehl conducted an investigation. He noted that Mr. Jasti was President of both BIT and CTI. He noted that BIT attempted to fully comply with the Act by retroactively posting at work sites where they had not done so, thereby acknowledging its familiarity with the posting requirements. CTI knew that its clients had not posted required LCAs because the documents provided by the company reflected that CTI had asked third party clients to post the LCA's and had been refused.

Mr. Rehl testified that CTI was straightforward about its posting practices and provided all documents relative to the issue. The investigator acknowledged that LCA's are approved on the affirmations of Employers, including those relating to posting. He believed that the Act required that the posting requirement refers to each individual employee, and not generally to a classification of employees. The DOL's position is that the posting authority extends to both employees of the employer and employees of anyone else at the actual site where non-immigrants work, regardless of whether Employer controls the ability to post at a client location. He believed that for electronic posting to be effective in such instances, it would have to be made on the website of the third party client where the non-immigrant worked.

Mr. Rehl admitted that the regulations do not specifically mandate that electronic posting be made at the actual location of non-immigrant workers, but he explained that a posting had to be on the actual company's website to give adequate notice of the presence of non-immigrants to the company's U.S. workers. Mr. Rehl did not think that a posting on CTI's website that identified the location of non-immigrants would give sufficient notice to the third party client's U.S. workers, unless they were specifically directed to look at CTI's website. Mr. Rehl acknowledged that a paper notice must by posted by Employers for only ten days, and he admitted that unless a U.S. employee actually passes the area of posting, they may never have notice of the presence of non-immigrant workers, unless someone told them about it. Similarly, they would not have reason to look for posting on an employer's website.

Mr. Rehl was aware that the Act defined an employer as the person who files the LCA and the paperwork to bring an individual to the United States. He admitted that the regulations

do identify a third party contractor of an H-1B Employer as an employer itself. Mr. Rehl admitted he did not have jurisdiction to investigate such third party contractors, who were located in various sites around the United States. However, he reiterated his position that the regulations require the Employer to post in all physical locations where its H-1B visa employees perform work.

Mr. Rehl agreed that if the third party contractor asked CTI's non-immigrant workers to perform the work at CTI's headquarters, and CTI had posted notice, the posting requirement would be met. He further acknowledged that in those circumstances, the third party contractors would not have notice that they were competing as it were with the non-immigrants.

Mr. Rehl testified that in 2005, he found no evidence that CTI had attempted to post at the actual site of work, but that in 2009, CTI produced evidence that they made such attempts. Mr. Rehl recalled that Mr. Gurnani told him he believed that an attempt to post was all that was required, and that this belief was widely held within the community of H-1B employers.

Mr. Rehl stated that DOL received a complaint against CTI in September, 2007, but did not conduct an investigation into that complaint until two years later. The complaint alleged violations of wage requirements, not notice posting. His investigation did not reveal back wage violations. The investigator's initial discussions with CTI representatives focused on the wage issue, but Mr. Rehl remembered talking about posting issues. He stated that at one of his meetings, he also provided to CTI fact sheets that the DOL publishes that explains the H-1B program and its requirements.

During the course of his investigations into CTI, Mr. Rehl became aware that BIT and CTI were linked by Ms. Parsram and Mr. Jasti. He acknowledged that DOL had concluded that the existing evidence pertaining to the BIT investigation did not demonstrate that any officer or official of CTI was aware of the findings in the BIT investigation. The determination letter in that investigation was addressed to Sridhar Marghan, vice president, not Mr. Jasti. Mr. Rehl had no knowledge about whether Mr. Marghan was associated with CTI.

Mr. Rehl testified that he was entirely dependent upon an employer's recitation of past posting practices, and he had no other way to determine whether a notice was posted for the ten required days. However, the recordkeeping requirements of the regulations mandate that employers retain documentation to show that they posted notice. The investigator stated that DOL considers any violation that occurs more than 20% of the time to be substantial. Therefore, he considered the posting violations to be substantial. He could not explain how CTI could have kept records of a contractor's posting, but he believed it was their obligation to gather and maintain such records. He would need something from the third party clients establishing that they had posted physically or electronically at their work site. In this case, CTI informed Mr. Rehl that if the third party client refused to post notice, they didn't force the issue, thereby establishing the violation. Mr. Rehl believed that CMPs were appropriate because CTI remained non-compliant upon the 2009 investigation, despite similar findings and the company's promise of compliance in 2005.

Mr. Rehl addressed the resolution of the BIT investigation, which ended with retroactive posting. He agreed that this probably did not resolve notice issues, considering that affected employees might no longer work at the company where the non-immigrants worked.

On rebuttal, Mr. Rehl stated that he did not recall Ms. Parsram's attendance at meeting on April 13, 2005 or December 15, 2005. His contemporaneous notes of those meetings reflect that he met with Mr. Gordon and Mr. Gurnani.

2. Testimony of John Warner (Tr. at 103-129)

Mr. Warner has been assistant district director in the northern New Jersey office of the Wage and Hour Division since March, 2006. He had been an investigator with the agency since September, 1977. He described the results of his investigation into BIT Technology's H-1B visa practices, which culminated in the determination letter issued June 19, 2002. He found three types of violations: failure to pay the required wage for several workers; the placement of workers at locations other than the one identified on LCAs; and failure to post the LCAs at place of employment. Mr. Warner testified that BIT admitted to posting all LCAs only at its headquarters in Woodbridge, New Jersey. This violated the Act because nearly all of the non-immigrant employees were outsourced and placed with end clients all over the country.

Mr. Warner held his initial conference on October 12, 2001 with company Vice President Sridhar Marghan and Director of Personnel Nalini Parsram. Ashwany Jasti was the company's president, and Mr. Warner believed he signed the LCAs. At the conference, Mr. Warner discussed the requirements for posting at the location where an employee actually works, and advised the company officials that employees should not be placed in a location unless posting had been made. Subsequently the company took action that demonstrated that it understood the posting regulations. The company retroactively tried to post in 60 locations where employees still worked throughout 17 states.

Mr. Warner described an email exchange between him and company officials that outlined the findings of his investigation. Mr. Warner met with the company officials again on November 29, 2001 and discussed his findings. He held a final conference on December 18, 2001, and the company agreed to pay back wages. He did not recall having further contact with the company.

Mr. Warner agreed that the investigation in 2005 revealed only one wage violation and the investigation in 2009 revealed none. He could not recall whether the company posted retroactive notice at his prompting or on its own initiative, but he was provided documentation of the posting. Mr. Warner testified that he cited to this action as a potential remedy to other employers who had failed to properly post LCAs at the location where non-immigrants physically worked.

Mr. Warner's attention was directed to the narrative report that he prepared regarding his 2001 investigation, in which he observed that the failure to post 60 LCAs at actual work sites was considered a nonsubstantial violation. He explained that he credited BIT's efforts to retroactively post as demonstrating its willingness to comply with the H-1B posting regulations.

Of the approximately 50 investigations into H-1B practices that Mr. Warner has conducted, four or five resulted in the assessment of CMP for failure to post.

When asked to identify which rights of U.S. workers are protected by posting, Mr. Warner explained that his understanding of the regulations was to ensure that non-immigrants were necessary to fill an employer's workforce needs because of inadequate U.S. workers for a particular type of work. The posting allows workers to contest that need by filing a complaint that shows the existence of U.S. workers who could have filled the H-1B visa positions.

3. Testimony of Patrick Reilly (Tr. at 130-171)

Mr. Reilly has been the District Director of the Northern New Jersey office of the Wage Hour Division of DOL for approximately two years. Before that appointment, he served as Regional Planning Office for the northeast region for about eight years. Mr. Reilly assumed that job after working as an investigator for about twenty-two years. He testified that he issued the determination letter of May 7, 2010 on behalf of the Administrator. Mr. Reilly stated that two violations were identified in the investigation that culminated in that determination: willful failure to provide notice of filing of LCAs and failure to maintain documentation concerning compliance with posting requirements. A CMP of $192,625.00 was imposed for the first violation, and no CMP was assessed for the second. Mr. Reilly has responsibility for assessing CMPs.

Mr. Reilly referred to the standard form used by WH to calculate CMPs. He explained that the form outlines the conditions and factors that he must consider when determining whether to assess CMPS, and provides instructions for their computation. Mr. Reilly testified about why he believed CMPs were appropriate in this case. He noted that the willful failure to properly post warrants debarment, and that a previous investigation had found the same violation. Mr. Reilly believed that the circumstances demonstrated that Respondent does not have a commitment to future compliance. Mr. Reilly observed that more than seven employees were affected by the investigation, considering that posting was not made at 67 of the locations where non-immigrant employees worked.

The calculation of CMPs for willful violations is based upon a computer model that begins with a penalty of $2,500.00, in reliance upon part 810 of the H-1B visa regulations. The maximum CMP for a willful violation of notice requirements is $5,000.00. Mr. Reilly explained that the maximum level of CMP would be reserved for the worst sort of violator. He did not place Respondent in that category, and he believed it was reasonable to assess half of that amount. After determining that $2,500.00 was an appropriate CMP, Mr. Reilly then reviewed factors that would either increase or decrease the penalty. Because a previous investigation of Respondent had disclosed the same violation, Mr. Reilly believed that an increase of 30% of the CMP was warranted. Although Mr. Reilly suspected the Respondent's actions did not demonstrate commitment to future compliance, he nevertheless did not believe that factor merited increase in the penalty. Because Respondent had less than 51 employees, the penalty was reduced by 10%, which was the maximum amount that this factor allowed. Mr. Reilly believed that Respondent's workforce was not so numerous to potentially affect a large number of people. The penalty was also decreased by 5% because Respondent fully cooperated with the

investigation. However, he did not believe that Respondent's conduct reflected correction of violations through self-audit, and therefore no decrease to the penalty was made for that factor. He also did not decrease the penalty for Respondent' good faith efforts to comply because he saw no evidence that Respondent tried to comply with the posting requirements, considering the prior investigation found the same violation.

Mr. Reilly believed that Respondent realized financial gain as a result of its failure to post. He observed that had Respondent complied with the regulations and refused to supply H-1B workers to contractors and third party end users who refused to post notice, then Respondent potentially would have lost 67 placements. Mr. Reilly was not able to quantify that gain, but he believed that it definitely existed. In addition, he believed that the failure to post was not inadvertent. He believed that Respondent willfully failed to comply.

After considering all of the factors that could affect the computation of CMP, Mr. Reilly used a base of $2,500.00, increased by 15% (30% increase (-) 15% decrease) multiplied by 67 violations. Mr. Reilly agreed with Mr. Rehl's characterization of Respondent's violation as both willful and substantial. It is substantial because Respondent was in violation of the posting regulations in the majority of instances. DOL procedures and guidance establish that where more than 20% of instances represent a violation, then it is substantial. There is a $1,000.00 ceiling for CMP assessment for a substantial violation, starting at a calculation of $500.00 subject to the same increase and decrease factors used when determining a CMP for willfulness. Respondent's CMP for substantial violations of the Act was based on a 15% increase, times 67 violations.

Mr. Reilly explained that when he considered whether the circumstances warranted an assessment of CMPs, he did not check off on the computation form all of the reasons because one reason was sufficient. He did not believe that the number of reasons supporting the assessment mattered. Mr. Reilly found that Respondent did not demonstrate a commitment to future compliance because the prior investigation clearly educated the company about its posting obligations. He also would have considered other indications of compliance. He found that Respondent's failure to comply despite instruction from the prior investigation made its subsequent non-compliance more serious. Mr. Reilly acknowledged that the 2009 investigation revealed that Respondent asked third parties to post and kept records of their attempts to post, which was more than they had done in the past. However, he did not find that this represented a good faith effort to comply, as he found that Respondent had willfully failed to comply, and U.S. workers were not advised of the presence of H-1B non-immigrant workers.

Mr. Reilly acknowledged that one of the factors identified on the CMP computation form was whether an employer sought legal advice, and he further acknowledged that Respondent had been represented throughout the investigation by its attorney. He nevertheless believed that Respondent should be penalized for its willful failure to comply even if Respondent had followed legal advice, because the actions the company took were ultimately within its decision.

Testimony of Nalini Parsram (Tr. at 173-207)

Ms. Parsram has been Vice-president of Human Resources (HR) and Administration for

Respondent since March, 2007. Her duties include supervising all aspects of human resources and preparing contracts and supervising collections. She does not personally handle human resource duties, which are performed by HR Manager Galina Legky. Ms. Legky handles Respondent's H-1B program processes, but Ms. Parsram is involved in setting Respondent's H-1B policies. From 2002 until February, 2007, Ms. Parsram was primarily involved in contracts and collections matters for Respondent. She coordinated contract needs with end users, kept files, coordinated billing, but was not involved in setting H-1B policy at that time. Prior to 2002, she was involved mainly in sales, but helped with human resource issues as well. Ms. Parsram had two breaks in service with Respondent for personal reasons, from July, 2001 until January, 2002 and from May, 2002 until the end of 2002.

Ms. Parsram testified that LCAs were prepared by an attorney in 2000, but not by Mr. Furnani. She stated that although she was on leave when the 2001 investigation began, she agreed to meet with the investigator because she had performed some work with human resource issues. At that time, HR Managers Renu Mandloi and Anurag Sharma took care of immigration matters. Ms. Parsram's involvement in that investigation was limited to the initial conference. She did not recall what was discussed, and she had no involvement with posting at clients.

Ms. Parsram was involved in the 2005 investigation that involved a complaint about wages, which the company paid to one employee. She explained that certain contractual obligations with clients, including non-compete clauses, made it difficult for Respondent to talk to end using clients, and she remembered explaining that difficulty to Mr. Rehl. She was able to discuss the posting requirements with CTI's direct contractors, but not with the third party users of the employees. Ms. Parsram testified that Respondent provided non-immigrant employees with copies of the LCAs in 2005, but had not kept documentation of that event. She remembered discussing this requirement with Mr. Rehl, and subsequently, the company kept documentation of providing LCAs to employees. She believed that she was present at both the April 13, 2005 and November 15, 2005 meetings.

Ms. Parsram recalled her discussion with Mr. Rehl about Respondent's posting dilemma. She said that Mr. Rehl acknowledged that Respondent's contractual obligations imposed difficulty on its ability to contact the third party end user. She explained that Respondent did direct its immediate contractors to post notice. She recalled Mr. Rehl advising that Respondent keep records of its attempt to post the LCAs at the end client location. Accordingly, Respondent created what they called an LCA statement, which they sent by email to each employee, along with a copy of the LCA and a form that showed that the employee had received it. The statement is placed in each employee's public access file. Respondent also created a document that recorded the results of its attempts to post LCAs. Respondent no longer uses that document, since learning in 2009 that it does not satisfy the posting requirements.

Ms. Parsram recalled that during the 2005 investigation, Mr. Rehl asked for information about BIT Technologies. She stated that BIT was acquired by CAMO Technologies, which is a publically owned company. BIT business practices changed after the acquisition, as CamoTechnologies is publicly traded, and Mr. Ashwany Jasti was the sole shareholder of BIT. However, the CEO and President of both companies were the same. There was a different HR staff in 2001 than in 2005. She started to work for BIT in May 2000 and until 2002 worked in

sales. When she returned from maternity leave, she worked in sales until the acquisition, and then she worked in contracts and collections. She had a role in HR, primarily administratively, to assure that paperwork was in order. She also worked with payroll, assuring that timesheets were submitted.

Ms. Parsram was present at every meeting involved in the 2009 investigation. She recalled that most of the discussion was about wages, although posting of LCAs was also discussed. She provided Mr. Rehl with public access files for all non-immigrant employees, and she had no concerns about what he would find, as she believed that Respondent was compliant. After the determination letter, Respondent changed its practices by making it mandatory to post at the end client. More information was added to the posting notice, and Ms. Parsram personally makes Respondent's clients aware that end users must post notice. Ms. Parsram testified that CTI has lost business because some end clients do not believe that the posting is necessary. She believes that the posting requirement has resulted in the loss of business. She has been told that posting shouldn't be necessary, since the H-1B employee is only a contractor and not an employee. Most of her feedback is from CTI's direct client. She communicates mostly through email, because that creates a record. Ms. Parsram has discussed Respondent's posting situation with other consulting companies, who have informed her that they have not been required to post at the end-user client location despite having the same business models as Respondent.

Ms. Parsram did not recall that whether Mr. Rehl told her that the firm would be compliant by merely documenting attempts to post at third party end users in 2005. She did not recall Mr. Rehl telling her that an attempt would not be good enough. She testified that Mr. Rehl expressed an understanding of Respondent's contractual obligations that made direct contact with third party users difficult. She recalled that Mr. Rehl instructed Respondent to document posting. She disagreed with Mr. Rehl's recollection that the December 15, 2005 was held at his office, but rather recalled that the meeting was held at Mr. Gurnani's office or at Respondent's office. She did not recall whether she had made and kept notes at all meetings, although she believed she made notes at some meetings.

Ms. Parsram explained that CTI is one of the divisions of parent company CAMO, Inc.

E. ANALYSIS

Pursuant to 20 C.F.R. § 655.840(b) an Administrative Law Judge has the authority to "affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator." 20 C.F.R. §655.840(b) provides for a review of assessed civil penalties by the ALJ, whose regulatory authority is broadly drawn. An ALJ's scope of authority to change the Administrator's assessment is "untrammeled" under the regulations and specifically includes a determination of the appropriateness of the assessed civil money penalty. Administrator v. Chrislin, Inc., 2002 WL 31751948 (DOLAdm.Rev.Bd.). Thus an ALJ has the discretion to determine whether the civil money penalties assessed by the Administrator are appropriate in light of the controlling statutory and regulatory factors.

The factual underpinnings of this adjudication are largely undisputed, as reflected by the parties' stipulations of fact. In summary, in 2009, Administrator conducted an investigation into

Respondent's H-1B visa practices, in response to a complaint about the proper payment of wages. Although that complaint was not borne out by the investigation, the Administrator found violations of the regulatory requirements to post LCAs at the worksites of non-immigrant workers. The Administrator had found similar violations in an investigation conducted in 2005. Moreover, an investigation of Respondent's predecessor company in 2001 revealed similar violations.

In its determination issued on May 7, 2010, the Administrator cited Respondent for violations of posting requirements, which it characterized as willful and substantial. The Administrator assessed CMP in the amount of $192,625.00 for the alleged willful and substantial nature of the violations. The Administrator also found that Respondent violated record-keeping requirements.

A.) Failure to provide notice of filing of LCAs

The notice requirement of an LCA mandates that employers post notice of their intent to hire non-immigrant workers. Under 20 C.F.R. § 655.805(a)(5), an H-1B employer must provide notice of the filing of an LCA. See, also, 20 C.F.R. § 655.734. The employer must provide such notice in one of the two following manners. "A hard copy notice of the filing of the LCA may be posted in at least two conspicuous locations at each place of employment where any H-1B nonimmigrant will be employed (whether such place of employment is owned or operated by the employer or by some other person or entity)". 20 C.F.R. § 655.734(a)(1)(ii)(A). Alternatively, "electronic notice of the filing of the LCA may be posted by providing electronic notification to employees in the occupational classification (including both employees of the H-1B employer and employees of another person or entity which owns or operates the place of employment) for which H-1B non- immigrants are sought, at each place of employment where any H-1B nonimmigrant will be employed." 20 C.F.R. § 655.734(a)(1)(ii)(B).

In addition, "the employer shall, no later than the date the H-1B nonimmigrant reports to work at the place of employment, provide the H-1B non-immigrant with a copy of the LCA certified by ETA and signed by the employer (or by the employer's authorized agent or representative)." 20 C.F.R. § 655.734(a)(3). The notice shall indicate "that H-1B non-immigrants are sought; the number of such non-immigrants the employer is seeking; the occupational classification; the wages offered; the period of employment; the location(s) at which the H-1B non-immigrants will be employed; and that the LCA is available for public inspection at the H-1B employer's principal place of business in the U.S. or at the worksite." 20 C.F.R. § 655.734(a)(1)(ii). Notification must be given on or within 30 days before the date the LCA is filed and should remain posted or available for a total of 10 days. 20 C.F.R. § 655.734(a)(1)(ii)(A)(3) and (a)(1)(ii)(B).

The evidence is uncontroverted that Respondent failed to file notice of LCAs at the actual location where non-immigrants worked. Respondent does not deny awareness of the posting requirements, and the record establishes that Respondent made attempts to facilitate posting at the work site of the H-1B workers.

I accord little weight to Respondent's argument that the regulatory definition of "employer" refers to the entity that applied for the H-1 B visa. This argument is at odds with the regulatory definition of "place of employment", which is defined as "the worksite or physical location where the work is performed." 29 C.F.R. § 507.715. This clearly establishes that the Secretary intended to require an employer to post the required notice at the location or locations where employees actually perform their everyday work. In addition, regulations pertaining to the posting requirement provide that "[t]he notice shall be of sufficient size and visibility, and shall be posted in two or more conspicuous places so that the employer's workers at the place(s) of employment can easily see and read the posted notice(s)." 29 C.F.R. § 507.730(h)(1)(ii)(A). I find that the use of the plural in "place(s) of employment" reveals that the phrase refers to more than the Employer's primary headquarters. I find that the requirement to post at the physical location of an employee is also consistent with the purposes of the H-1B statutory scheme, which in part strives to protect the wages and working conditions of American workers from being adversely affected by the employment of H-1B workers. See, 57 Fed. Reg. 1,316 (1992).

Accordingly, I find that Respondents did not provide notice of the intent to hire non-immigrant workers in violation of 20 C.F.R. §734(a)(1).

1. Willfulness of Non-posting

Willful failure is defined by 20 C.F.R. § 655.805(c) as "a knowing failure or a reckless disregard with respect to whether the conduct was contrary to [the Act]." 29 CFR § 655.805(b) (1995) and 29 CFR § 655.805(c) (2002); McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988); see also Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

I find that CTI had actual knowledge of its obligation to post at all locations where employees worked. However, I find that the preponderance of the evidence fails to establish that it knowingly and intentionally violated the posting requirement. There is no dispute that Respondent posted notice of LCAs at its main offices. The record is also undisputed that after the 2005 investigation, Respondent developed a system whereby it documented its attempts to post LCAs with third party end users of non-immigrants who were contracted out by Respondent's direct customers. The record also discloses that posting took place at several sites out of Respondent's control. I discredit the Administrators' argument that Respondent made only "cosmetic" changes in its posting practices. It is clear that in 2005, no efforts to post off-site were made, but by 2009, the public access file for each non-immigrant worker contained documentation referring to posting at sites other than Respondent's main offices. In addition, the 2009 investigation revealed that CTI had implemented the practice of having employees acknowledge receipt of a copy of the LCA.

In support of its argument of willfulness, the Administrator argues that Investigator Rehl advised Respondent during the 2005 investigation that if a third party refused to post the LCA, then the employee should not be placed. He testified that it is his practice to advise investigation subjects of the posting requirements. Mr. Rehl's recollection that Ms. Parsram was not in attendance at his initial meeting with company officials in April, 2005 is supported by his contemporaneously prepared memo to file, which does not include her as one of the attendees. AX 5. His narrative report of January 11, 2006 reflects that he met with only Mr. Gurnani on

December 15, 2005 for a final conference. RX 1. Mr. Rehl testified that he met only with Mr. Gurnani at his offices in November, 2005. Ms. Parsram recalled meeting with Mr. Rehl during the 2005 investigation and explaining the company's posting process. I accord more weight to Mr. Rehl's testimony on this issue, as it is supported by the record. I note that Ms. Parsram's recollection about the timeframe of participation in the investigation process may have been confused. However, I am not entirely convinced that Ms. Parsram was not in attendance at the November, 2005 meeting at Gurnani's office. She testified that she attended at least one meeting with both Gurnani and Rehl that was held at either his office or CTI's offices. Ms. Parsram was uncertain whether she had kept notes of the meeting, and did not know that she retained such notes, if she had made them. In contrast, Mr. Rehl has offered documentary evidence in support of the attendees at every meeting other than the November, 2005 meeting, thereby undermining his recollection about that occasion somewhat suspect.

Considering the number of meetings that both Mr. Rehl and Ms. Parsram attended over a long span of time to discuss CTI's H-1B-visa practices, I decline to find that this discrepancy in the testimony supports finding willfulness in CTI's conduct. CTI fully cooperated in the 2009 investigation and provided documents that the Administrator admitted did not appear to be fabricated in any way (Tr. 59). Ms. Parsram had no trepidation about the company's documentation, as she believed CTI was compliant. Tr. 186. It defies reason to conclude that CTI would keep and produce such candid records of non-compliance if it thought that its practices were in violation of the regulatory requirements. Considering that the Administrator is totally reliant upon the representations of Employers regarding posting, CTI could easily have kept files that noted that posting was accomplished. Indeed, the Administrator admitted that it has no authority to investigate whether a third party complied with posting, but was limited to determining from an employer's documentation whether posting had been accomplished. Tr. at 71.

I find support for the Administrator's finding that CTI knew after the 2005 investigation what the regulations required. I fully credit Mr. Rehl's testimony that he would not have sanctioned the policy that CTI implemented had CTI asked him for approval. However, I also credit Ms. Parsram's testimony that she believed that the company's subsequent practices met the regulatory requirements for third party posting. Accordingly, I find that the eventual practice that CTI used for posting at third party end users of H-1B employees did not amount to a willful decision to violate the law. The record establishes that following the 2005 investigation, CTI changed its posting and recordkeeping practices to reflect that it attempted to comply with the regulations.

The Administrator argues that Respondent's actions represent willfulness because the 2009 investigation into its actions was the third of its kind. This argument is inconsistent with the evidence. I credit Mr. Rehl's testimony that he did not consider the 2001 investigation into BIT Tech to be a prior investigation (Tr. at 51), as it is supported by documentary evidence. Mr. Rehl's narrative report dated January 11, 2006 states that "it can not [sic] be demonstrated that any officer or official of Camo [T]echnolgies had any knowledge of the findings in the prior investigation." RX 1, page 3. In addition, the fact that the posting violations uncovered in 2005 were considered non-substantial supports my finding that the Administrator considered the 2005 investigation of CTI to be the first. I therefore reject the Administrator's arguments that the BIT

Tech investigation should be imputed as the first of three investigations into Respondent's posting practices . I place great weight on the contemporaneous conclusions of Mr. Rehl regarding the 2005 and 2009 investigations, which I find represent the first and second, respectively, that the Administrator conducted into Respondent's H-1B visa practices.

Parenthetically, I find that the evidence does not establish a clear connection between the individuals who represented BIT Tech and those who represented CTI in the various investigations. Although Ms. Parsram was involved to some degree in all three, the Administrator's evidence establishes that she was minimally involved in the 2001 and 2005 investigations. Although Mr. Jasti was President of both entities, the record is devoid of evidence establishing his involvement in, or knowledge about the outcome of, the investigations and CTI's actions thereafter.

Even if I were to consider the 2009 investigation the third that uncovered posting violations, I would continue to find that the violations disclosed by the 2009 investigation are not willful. In that investigation, Respondent produced documentation of attempts to post, and also produced other records documenting that non-immigrants had been provided copies of LCAs. This documentation represents a marked improvement from Respondent's actions in 2005, where no posting was even attempted, and no documentation was maintained. Despite the total lack of compliance, no civil money penalties were imposed in 2005. I find that Respondent implemented measures to document posting and other regulatory requirements in voluntary, though inadequate, compliance with the law. I decline to find that the 2009 violations demonstrate willfulness on Respondent's part.

I find that Respondent's actions represent a good faith effort to comply with the regulatory posting requirements. Willfulness is not warranted where good faith exists. Although Respondent's subjective belief about compliance does not relieve it of its obligation to meet the regulatory mandates of the H-1B visa program, in these circumstances, I find that Respondent's posting practice, though deficient, does not constitute a willful violation of the Act.

2. Reckless disregard for the law

I find that the record does not demonstrate that Respondent displayed reckless disregard of the regulatory posting practices. As I have observed, Mr. Rehl's 2009 investigation disclosed attempts to post at third-party work sites, which was an improvement over what he found in 2005. Moreover, the findings of the 2005 investigation found posting violations that were considered non-substantial. The record does not establish how many non-immigrant employees were placed at locations without proper posting. Information about the number of non-immigrants employed by CTI during the period covered by the CTI investigation cannot be found in the parties' stipulations, Mr. Rehl's testimony and narrative report (RX 1), Ms. Parsram's testimony, or the Administrator's determination (JX-8). In fact, the evidence of record regarding the 2005 posting violations is so scant that it fully supports the Administrator's determination that the posting violations were non-substantial.

Mr. Rehl testified that at the end of that investigation, he advised CTI that it was being given "a break because it's going to be considered an initial investigation but if we have to come out the second time and you're still not in compliance that's when you face the severe penalties. I

say, that's when you're really going to have a problem". Tr. 51. However, the investigator's testimony does not demonstrate exactly what violations he referred to during that discussion. The 2005 investigation revealed both wage and posting violations. When Mr. Rehl's testimony is compared to his narrative report from the investigation, one may refer that the focus of his final conference discussion was Respondent's wage violation. See, RX1. Accordingly, I find that it may be inferred from the evidence that Respondent had little reason to believe that any deficiency in its posting practices would be treated as significant. CTI can be credited for not understanding the gravity of potential future violations of posting requirements.

I find that the evidence fails to establish that Respondent acted with reckless disregard for the regulations, or the consequences of non-compliance.

3. Civil Money Penalty Computations

The Administrator "may" assess civil monetary penalties up to $1,000 for non-willful violations and up to $5000 for willful violations of the INA. 8 U.S.C. § 1182(n)(2)(C)(i)-(ii); 20 C.F.R. § 655.810(b)(1)-(2)(i)-(iii). "Seven factors may be considered in determining the amount of a monetary penalty: previous history of violations by the employer; the number of workers affected; the gravity of the violations; the employer's good faith efforts to comply; the employer's explanation; the employer's commitment to future compliance; the employer's financial gain due to the violations; or potential financial loss, injury or adverse effect to others." 20 C.F.R. § 655.810(c). In addition, the statute at 8 U.S.C. 1182(n)(2)(C) provides that civil monetary penalties are to be assessed for a failure to post LCAs only if the failure is found to be a substantial violation of the requirement.

The ALJ's authority to review the Administrator's assessment specifically includes a determination of the appropriateness of a civil penalty. See Administrator, Wage and Hour Division v. Law Offices of Anil Shaw, 2003-LCA-20 (ALJ May 19, 2004) (citing Administrator v. Chrislin, Inc., 2002 WL 31751948 (DOL Adm.Rev.Bd)).

a) Good Faith

I have found that Respondent acted in good faith to comply with the law so as to negate a finding of willfulness. However, it is also appropriate to address whether the Administrator considered whether Respondent acted in good faith when it determined that Respondent's willful violation of posting requirements warranted civil money penalties. I accord weight to Respondent's argument that the Administrator did not fully consider all the appropriate factors when making that determination.

Firstly, Mr. Reilly found Respondent's actions willful before considering good faith, because he believed that if he had credited Respondent with good faith, he would have been less likely to determine willfulness. Tr. 133, 158. This suggests that the Administrator did not fully consider whether Respondent made attempts to reach compliance, or considered how the company might benefit from keeping records that clearly show its failure to post at third parties. There is conflicting, credible testimony regarding Respondent's understanding of its obligations regarding posting. I place no weight on the fact the Respondent did not seek clarification from

WH about posting after the 2005 investigation, because I credit Ms. Parsram's testimony that she believed that the company was compliant. I place little weight on whether Mr. Rehl held all of his meetings about the 2005 inquiry with Ms. Parsram or with Mr. Gurnani, as I find it more useful to consider the probative value of what happened after Rehl's meetings with CTI representatives in 2005. I find that Respondent's progressive improvement in posting practices and record keeping between the 2005 and 2009 investigations was not credited by the Administrator. The potential merit of Respondent's post-2005 efforts at compliance should have been considered before concluding that willful violations occurred. At the very least, Respondent's actions should have been fully considered a factor in the consideration of whether a reduction of civil money penalties was warranted.

b) Economic Gain

I reject the Administrator's conclusion that Respondent benefited from economic gain as the result of its failure to post. There is no evidence that Respondent's posting policy was motivated by the potential for economic gain or loss. Although Respondent has admitted to losing some contracts due to its insistence on third party posting, that outcome was mere speculation at the time of the Administrator's determination. Indeed, Respondent's insistence on third party posting despite losing business demonstrates its commitment to complying with the Act. Willfulness implies intent, and nothing establishes intent to avoid economic loss or to gain an economic advantage by CTI's posting methods. Although the evidence reflects that CTI and its legal advisor[4] believed that an attempt to post would satisfy the regulatory requirements, I do not find that this establishes evidence that CTI realized an economic advantage through its practices.

c) Repetitive Nature of Violation

Mr. Reilly increased the amount of civil money penalty because he believed that the 2009 investigation revealed repetitive violations. I find little basis in the record for this conclusion. As I have noted, the number of non-immigrants for whom posting was not made in the 2005 investigation is not in evidence. I have also found, based upon the Administrator's own evidence, that the 2001 investigation into BIT Tech cannot be imputed to CTI. In addition, although the 2005 and 2009 investigations demonstrated failure to post, the record establishes that CTI kept better records and made attempts to post notice, which represents improvement from its actions before 2005. Accordingly, I find that Mr. Reilly did not consider all of the evidence when he concluded that civil money penalties were appropriate for a repeat violation.

Even if I were to impute the findings of the BIT Tech investigation to CTI, I would continue to find that the evidence is inadequate on the issue of repetitive violation. Investigator Warner uncovered 60 violations in 17 states, and the violations were considered remedied by retroactive posting. As I have observed, the record does not establish that the focus of the 2005 investigation was posting, and no remedy was suggested despite the disclosure of posting violations. In the 2010 investigation Respondent produced documentation of attempts to post,

[4] By referring to Mr. Gurnani's beliefs, I do not mean to infer that a defense of advice of counsel is at issue. Rather, I give weight to Mr. Rehl's uncontradicted testimony that Mr. Gurnani advised Mr. Rehl about industry practices regarding posting at third party sites.

yet civil money penalties were imposed, despite evidence that Respondent implemented measures to document posting and other regulatory requirements in voluntary compliance with the law. I find that the variation in remedies and penalties demonstrates that the Administrator did not entirely believe that Respondent engaged in repetitive violations. Moreover, as I have observed, the record clearly shows that Respondent made changes in its posting policies that did result in posting at actual employee work sites on some, though admittedly few, occasions.

d) Substantial Violation

I agree with the Administrator that CTI's failure to fully comply with posting requirements does not constitute a mere technical or procedural failure, as the company's posting practices did not further the purpose of protecting United States workers. However, the record fails to demonstrate whether U.S. workers actually were impacted by the failure to post at sites where the non-immigrant employees worked. The Administrator found that Respondent had failed to properly post LCAs at the work sites of 67 out of 92 H-1B visa workers. There is no evidence of how many U.S. workers worked alongside the non-immigrants. There is no evidence that the non-immigrants even reported to another worksite with other employees. It is entirely possible that they tele-commuted during their employment. In the absence of any evidence establishing any impact on U.S. workers, I decline to find support for the Administrator's determination that Respondent's posting policies represent a substantial violation of the regulations.

The Administrator's conclusion that the 2009 violations were substantial is arbitrary in that it is inconsistent. The 2005 investigation disclosed violations that it considered not substantial. The violations were considered so inconsequential that the evidence of record does not identify how many violations occurred. See, Testimony of Ronald Rehl, RX-1; JX-8; JX-12. I note that the investigation of BIT Tech identified 115 employees, of whom 108 were H-1B non-immigrant employees. That entity had failed to post LCAs' at "virtually every" work site of the non-immigrant employees, and resulted in a finding that the company had failed to post LCAs at 60 work sites in 17 states. RX 2. I find that this finding is inconsistent with the Administrator's stated policy of considering a 20% non-compliance rate to be a substantial violation. I further find that by finding in 2005 that the failure to properly post LCAs at the actual work sites is not a substantial violation, the Administrator misled Respondent regarding the gravity of the posting requirements.

I note that Mr. Reilly was not involved in the 2005 investigation of Respondent, or the 2001 investigation of BIT Tech and I credit his testimony that he may have found substantial violations in those instances. However, his opinion does not change the evidence that was, or should have been, considered in the Administrator's assessment of penalties in the 2009 investigation.

In summary, the record demonstrates that the Administrator did not properly consider all factors in reaching its conclusion that Respondent's posting policies following the 2005 investigation represent willful and substantial violations of the Act. I therefore find that the Administrator's assessment of civil money penalties in this matter is inappropriate.

e) Debarment

The regulations mandate that the Department of Homeland Security (DHS) shall invalidate any current LCAs held by employers who substantially fail to post notices of LCA filings. In addition, DHS' invalidation includes rejection of future LCAs for a period determined by DHS. 8 U.S.C. §1154 and §1184(c); 20 C.F.R. §655.855(a), (c) and (d). As I have found that the Administrator has failed to establish that Respondent substantially failed to post notices of LCA filings, I find that debarment is not appropriate.

f) Penalty for Non-Willful Violations

It is clear from the record that Respondent violated the Act by failing to properly post LCAs at all locations where non-immigrant employees worked. However, the Administrator did not assess CMPs for non-willful violations, and I decline to do so.

B. Failure to maintain documentation

The Administrator cited Respondent for its failure to maintain documentation that showed that it had satisfied its obligations to inquire into the displacement of U.S. workers by its placement of non-immigrants at secondary locations. See, 20 C.F.R. §655.738(e)(2). Respondent's pre-hearing report argued that certain exemptions to the requirements applied. However, no evidence was adduced at hearing in support of this defense. I find that Respondent has violated this regulation. No CMPs were computed.

III. CONCLUSION

For the foregoing reasons, I affirm the Administrator's determination that Respondents failed to provide notice of the filing of LCAs in violation of 20 C.F.R. §655.734. However, I find that Respondent's violations were not willful or substantial. I further find that the Administrator did not appropriately consider all factors in reaching its conclusions and assessing civil money penalties. I find that civil money penalties are not warranted, and further find that debarment is not appropriate in these circumstances.

I affirm the Administrator's determination that Respondent had failed to maintain proper records pursuant to 20 C.F.R. §655.738(e)(2).

So ORDERED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) calendar days of the date of issuance of the administrative law judge's decision. *See* 20 C.F.R. § 655.845(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. *See* 20 C.F.R. § 655.845(a).

If no Petition is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 655.840(a).