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In the Matter of	:	
	:	Dated: November 3, 1998
ADMINISTRATOR, UNITED STATES,	:	
DEPARTMENT OF LABOR,	:	
WAGE AND HOUR DIVISION	:	
Complainant	:	Case No.: 1996-ARN-3 ¹
	:	
v.	:	
	:	
ALDEN MANAGEMENT SERVICE, INC.	:	
Respondent	:	

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Before: JEFFREY TURECK
 Administrative Law Judge

**INTERLOCUTORY ORDER GRANTING IN PART ADMINISTRATOR’S
MOTION FOR SUMMARY JUDGMENT**

A. Purpose of the Act and Procedural History

This case arises under the Immigration Nursing Relief Act of 1989 (“INRA” or “Act”), 8 U.S.C. Section 1101 *et seq.* as amended, and the Secretary of Labor’s regulations provided at 29 C.F.R. Part 504. The purpose of the INRA was “to assist in alleviating the national shortage of registered nurses by allowing for the adjustment of status of certain nonimmigrant registered nurses currently in the United States and by establishing conditions for the admission of foreign registered nurses during a five year period.”² Congress recognized that the potential economic effect of allowing non-immigrant nurses into the American workforce could be depressed wages and depressed working conditions for the domestic nursing workforce as well as a potential

¹The Office of Administrative Law Judges has adopted a new case numbering system under which the year of docketing will be listed in full (*e.g.*, 1996) rather than utilizing only the last two digits (*e.g.*, 96). Accordingly, this case will now be captioned *1996-ARN-3* rather than *96-ARN-3*.

²H.R. 3259, 101st Cong., 2d Sess., 135 Cong. Rec. 1894 (1989).

lockout of U.S. nurses by facilities seeking to reduce operating costs by employing foreign nurses for less money. In light of this concern, Congress created the “attestation” process requiring each facility seeking to employ nonimmigrant nurses to file an attestation with the Secretary of Labor³ confirming that (1) the facility will pay “the alien the wage rate for registered nurses similarly employed,” (2) “employment of the alien will not adversely affect the wages and working conditions of registered nurses similarly employed,” and (3) “[a]t the time of the filing of the petition for registered nurses under section 1101(a)(15)(H)(I)(a), . . . notice of the filing has been provided to registered nurses employed at the facility through posting in conspicuous places.”⁴

Additionally, the Secretary of Labor is empowered to investigate and dispose “of complaints respecting a facility’s failure to meet conditions attested to or a facility’s misrepresentation of a material fact in an attestation.”⁵ Under the Act’s enforcement provisions, if the Secretary determines that a

³8 U.S.C. Section 1101(a)(15)(H). In accordance with 29 C.F.R. Section 504.310(b), the Secretary of Labor required that attestations be filed with the Chief of Foreign Labor Certifications at the Employment and Training Administration in Washington, D.C. The Secretary of Labor’s regulations were amended in January 1994 requiring all attestations to be filed with the Employment and Training Administration Regional Office which has jurisdiction over the geographic area where the nonimmigrant nurse will be employed. 59 F.R. 882 and 898.

⁴8 U.S.C. §1182(m)(2).

Acceptance of the attestations by the Department of Labor for filing does not constitute governmental approval of the truthfulness and the accuracy of the representations made therein, only that the proper representations are set forth. Rather the burden was placed on the employer to submit a complete and truthful attestation.

The bill provides that the attestation shall be filed with the Department of Labor and the approval of a petition by the Attorney General is based on that document in the file. The Committee notes this is a streamlined process and does not anticipate lengthy review of the documentation prior to the Secretary of Labor’s approval. In fact, the very nature of the penalty structure . . . contemplates maximum flexibility for the admission of aliens under the pilot program and severe penalties for those who fail to meet the terms of the attestation.

H.R. Rep. No. 101-253, 101st Cong. 2d Sess., 135 Cong. Rec. 1897-98 (1989). Consistent with Congress’ intent, the Secretary of Labor’s regulations at 29 C.F. R. §504.310(m)(1)(ii) provide that “DOL is not the guarantor of the accuracy, truthfulness or adequacy of an attestation accepted for filing.”

⁵ 8 U.S.C. § 1182(m)(2)(E)(ii).

facility has failed to meet the elements of its attestation, civil money penalties may be assessed and an employer is required to pay any back wages owed.⁶

The Administrator has filed a *Motion for Summary Judgment* arguing that there is no genuine issue of material fact in dispute and the Department is entitled to judgment as a matter of law. The Administrator seeks payment of back wages in the amount of \$787,734.80 and civil money penalties in the amount of \$119,000. The Respondent filed a *Motion to Dismiss* arguing lack of jurisdiction and that the statute should not apply because respondent is not a “facility.” In the alternative, Respondent argues that the Administrator’s *Motion for Summary Judgment* should be denied because there are genuine issues of material fact in dispute.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

B. Case Background

The Administrator and Respondent Alden Management Services, Inc. (“AMS”) have entered into a number of stipulations regarding this case. Respondent is in the business of providing services to seven nursing homes. These services include financial services and support, regulatory support, risk management service, nursing, dietary, and maintenance support, and advice in employment matters such as recruiting, hiring, discipline and discharge of employees (JS 4, 7). AMS employs approximately 100 employees at its corporate offices (JS 14). At least two of the officers of AMS, Floyd A. Shlossberg, the President, and Joan Carl, the Secretary and Vice-President, were also officers for all of the seven nursing homes to whom AMS provided services (JS 10-11). Each of these seven nursing homes is individually incorporated (JS 12-13), and together they employ over 700 people (JS 15). AMS owns five of the seven nursing homes at issue in this case (JS 12). While AMS itself is not licensed to

⁶ These provisions state:

(iv) If the Secretary of Labor finds, after notice and opportunity for a hearing, that a facility (for which an attestation is made) has failed to meet a condition attested to or that there was a misrepresentation of material fact in the attestation, the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$1,000 per violation) as the Secretary determines to be appropriate.

(v) In addition to the sanctions provided under clause (iv), if the Secretary of Labor finds, after notice and an opportunity for hearing, that a facility has violated the condition attested to under subparagraph (A) (iii) (relating to payment of registered nurses at the prevailing wage rate), the Secretary shall order the facility to provide for payment of such amounts of back pay as may be required to comply with such conditions.

8 U.S.C. § 1182 (m)(2)(E).

provide nursing care and provides no skilled nursing care at its address, each of the seven nursing homes are licensed to provide skilled nursing care to residents by the State of Illinois Department of Public Health (JS 5, 6, 9).

In 1992, Joan Carl filed a "Health Care Facility Attestation," H-1A, with the Department of Labor (JS 16, 17, Ex. C). Respondent filed three other Health Care Facility Attestations in 1993, 1994, and 1995 (Ex. D, E, F). Each of the attestations filed were valid for the year following their receipt at the Department of Labor (JS 18-24). Based upon the representations made within the attestations, the attestations were approved by the Employment and Training Administration ("ETA") (JS 18-24, Ex. C, D, E, F). The recruitment of nonimmigrant H-1A nurses from the Philippines was then commenced by Fely Balabagno (JS 25, 26). Respondent filed H-1A visa requests with the Immigration and Naturalization Service in Lincoln, Nebraska (JS 29). Employment contracts were signed by each of the individual nonimmigrant alien nurses and either Carl or Balabagno (Ex. G).

Respondent submitted the required I-129 INS form for each of the nonimmigrant nurses Respondent was petitioning to be brought to this country under an H-1A visa (JS 30, Ex. H). In these I-129 petitions, Respondent represented itself as a business involved in nursing home and health care services, with over 700 employees (Ex. H.) Respondent also represented in the I-129 form that the nonimmigrant alien nurses would work as full-time professional nurses in a nursing home at a weekly salary of \$440.00 (*id.*).⁷

From 1992 to 1995, the seven nursing facilities employed the nonimmigrant nurses as Certified Nurses Aides ("CNA"), Registered Nurses License Pending ("RNLP"), or Registered Nurses ("RN") (JS 32, 33). Nonimmigrant H-1A nurses who worked as CNAs earned between \$4.50 and \$7.00 per hour while employed by Respondent's nursing homes (JS 44). Nonimmigrant H-1A nurses who worked as RNLPs earned between \$11.00 and \$12.00 per hour (JS 45).

In April 1995, the U. S. Department of Labor's Wage and Hour Division received a telegram from the U. S. Department of State regarding Respondent's compliance with the Act (JS 34, Ex. J). This telegram alleged several potential violations of the Act (Ex. J). An investigation of the allegations was then commenced by the Chicago office of the Wage and Hour Division (JS 37). At the end of the investigation, the Wage and Hour Division concluded that the H-1A nonimmigrant nurses petitioned for by Respondent were improperly employed according to the Act and were being paid less than the prevailing wage rate for registered nurses similarly employed as required by the Act (Ex. K). In a letter dated April 3, 1996, the District Director of the Chicago office sent a Determination Letter to Respondent alleging violations of the Act and its corresponding regulations (*id.*).

⁷It does not appear that a salary of \$440 a week would have been sufficient to satisfy the attestations that the nonimmigrant nurses would be paid the wage rate for registered nurses similarly employed by the facilities, which the parties stipulated averaged \$13.50 an hour (*see infra*). However, this representation of a \$440 salary does not figure further in this case.

C. Discussion

1. Jurisdiction

a. Definition of “Aggrieved Person,” “Complaint,” and Authority to Investigate

Respondent argues that the case should be dismissed for lack of jurisdiction because the Act and its accompanying regulations require a “complaint” from an “aggrieved person or organization” before the Administrator can initiate an investigation. Absent a valid complaint, Respondent asserts that DOL cannot initiate an investigation under the INRA. The Act states that:

[t]he Secretary of Labor shall establish a process for the receipt, investigation, and disposition of complaints respecting a facility’s failure to meet conditions attested to or a facility’s misrepresentation of a material fact in an attestation. Complaints may be filed by any aggrieved person or organization (including bargaining representatives, associations deemed appropriate by the Secretary, and other aggrieved parties as determined under regulations of the Secretary). The Secretary shall conduct an investigation under this clause if there is reasonable cause to believe that a facility fails to meet conditions attested to thereto.

8 U.S.C. §1182(m)(2)(E)(ii). Respondent argues that under this language, the Administrator did not have the authority to investigate because the Administrator should not have treated the State Department as an “aggrieved person,” nor the telegram as a “complaint.” Respondent finally argues that *Department of Labor v. Newport News Ship Building and Dry Dock Company*, 514 U.S. 122 (1995) precludes the Department of Labor from being considered an “aggrieved person.” The Administrator argues that the term “aggrieved person or organization” is defined broadly and can include initiating an investigation due to a telegram from the State Department.

I find that the Act, its accompanying regulations, and its legislative intent, do allow for the Administrator to initiate a investigation based on the telegram from the State Department. The assertion that *Newport News* controls this case can be disposed of first because that case is not analogous to the facts at hand. The primary question in *Newport News* was whether a governmental agency acting in its governmental capacity can be considered an “aggrieved person” for purposes of judicial standing. See *Newport News*, 514 U.S. at 126-28. In *Newport News* the Director, Office of Worker’s Compensation Programs of the Department of Labor, petitioned the United States Court of Appeals for the Fourth Circuit for review of an issue that neither of the parties had pursued. *Id.* at 124. The Fourth Circuit, *sua sponte*, raised the question of whether the Director had standing to appeal the case. The Fourth Circuit concluded that the Director did not have standing to appeal the case under the Longshore and Harbor Workers’ Compensation Act. The case at hand has nothing to do with the Department of Labor’s authority to appeal a decision in a case in which it does not have an actual interest, but instead concerns the Department of Labor’s authority to commence an investigation regarding a possible violation of a statute under which it is authorized to bring enforcement actions. Accordingly, I find that *Newport News* does not control this case.

This case concerns whether the Department of Labor can invoke its statutorily granted investigatory authority when it receives a telegram detailing alleged violations of the INRA from the State Department. I find that it can. The Department of Labor, Department of State, and the Immigration and Naturalization Service work together to administer the H-1A program. If the Respondent's argument that the telegram is not a complaint and that the State Department is not an aggrieved person was accepted, it would force each of these agencies in many circumstances to turn a blind eye to alleged violations of law discovered by the other agencies administering the Act. This is clearly not what Congress intended. Rather the legislative history reflects that the Secretary can initiate an investigation where the Secretary has "reasonable cause to believe a facility fails to meet conditions of the attestation."⁸ Furthermore, the Department's own regulations are broad enough to allow the Secretary to commence an investigation absent a complaint, stating that the "Administrator, either pursuant to a complaint *or otherwise*, shall conduct such investigations as may be appropriate"⁹ Therefore, I find that the Administrator was authorized to commence an investigation based on the complaint made in the State Department's telegram.

b. Definition of "Facility"

Respondent next argues that the Administrator did not have authority to pursue an investigation of AMS because it is not a "facility" under the meaning of the Act. In support of this argument, Respondent states that a "facility" is defined as a "user of nursing services with either a single site or a group of contiguous locations at which it provides health care services."¹⁰ As an entity that employed no nurses on its site, Respondent argues it was not a facility, and therefore the Administrator should have concluded its investigation as soon as it discovered this fact. The Administrator contends that Respondent should be considered a facility because it represented that it was a facility in all of the attestations filed with the Department and therefore must be held to its representations. The Administrator additionally argues that because AMS benefitted from the employment of the nurses it should be equitably estopped from now claiming that it is not a facility.

The Act states that an attestation should be on file for each facility which "shall include the petitioner and each worksite, other than a private household worksite, if the worksite is not the alien's

⁸ The House report issued by the Judiciary Committee states:

Investigations may be initiated in two instances: (1) through the Secretary of Labor when there is reasonable cause to believe a facility fails to meet conditions of the attestation, and (2) upon the filing of a complaint by an aggrieved party.

House Report (Judiciary Committee) No. 101-288, Oct. 16, 1989, p. 1900.

⁹ 29 C.F.R. 504.400(b) (emphasis added).

¹⁰ 29 C.F.R. 504.302.

employer or controlled by the employer”¹¹ The language of the Act here is clear, stating specifically that a “facility shall include the petitioner.” Furthermore, the regulations state that “[a]ny entity meeting the definition of a ‘facility’ in §504.302, may submit an attestation.”¹² Therefore, because the Act and its accompanying regulations provide that only a “facility” may file attestations and seek approval for H-1A visas under the Act, the fact that AMS filed such attestations must be held as its acceptance that it is a “facility” for purposes of this Act. To hold otherwise would be both illogical and absurd. For it would create a loophole whereby certain petitioners could take advantage of the benefits of the Act while not being subject to liability for noncompliance with its requirements. Since AMS represented itself as a facility in seeking the benefits of the Act, it must be estopped from denying its status as a facility when its compliance with the Act is being challenged. Accordingly, I hold that AMS is a “facility” under the INRA.

c. Reasonable Cause to Investigate

The Respondent also argues that the State Department’s complaint did not provide reasonable cause to investigate the alleged violations of the INRA with which this case is concerned, since none of these allegations were contained in the State Department telegram. I disagree. The telegram from the State Department details a number of potential violations of the INRA. This certainly gave rise to “reasonable cause to believe that a facility fails to meet conditions attested to,” and provided ample grounds to initiate an investigation of Respondent’s practices. Once an investigation into AMS’s compliance with the Act was commenced, it was reasonable for DOL to fully investigate AMS’s compliance with the Act rather than address only those issues raised in the telegram. Accordingly, I find that the Respondent’s contention that the case should be dismissed on this issue to be without merit. In any event, as indicated above, I find that a complaint was not required for DOL to initiate an investigation of a facility’s compliance with the Act.

d. Determination Letter Issued More than 180 Days After the Complaint

Respondent contends that the Determination Letter issued by the Administrator was invalid because it was not issued within 180 days of the complaint. While the INRA states that “the Secretary shall provide, within 180 days after the date such a complaint is filed, for a determination as to whether or not a basis exists to make a finding described in clause (iv)”¹³ and the regulations reflect likewise,¹⁴ existing case law is clear that the Administrator in this situation should not be precluded from bringing this action after the 180 day period. “[G]overnment agencies do not lose jurisdiction for failure to comply with statutory time limits unless the statute ‘both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the

¹¹ 8 U.S.C. §1101(a)(15)(H)(i)(a).

¹² 29 C.F.R. 504.310.

¹³ 8 U.S.C. §1182(m)(2)(E)(iii).

¹⁴ 29 C.F.R. §504.410(d)

provision.’ ” *Brock v. Pierce County*, 476 U.S. 253, 259 (1986). The INRA does not specify consequences for the Administrator’s failure to act within the 180 period, therefore the time limitation is directory rather than jurisdictional. Accordingly, I find that despite the failure to file the determination letter within the 180 day time period, the Administrator retained the jurisdiction to seek enforcement of Respondent’s violation of the Act.

e. Statute of Limitations

Respondent also argues that the Administrator applied the wrong statute of limitations to this case by applying the two-year period of limitations from the Fair Labor Standards Act. The respondent asserts that the one year statute of limitations for an H-1B complaint (another immigration program for temporary employment) should be applied because it is more closely analogous to an H-1A complaint than is a Fair Labor Standards Act complaint. I agree.

Where a federal statute fails to provide a limitations period for a cause of action, there is a longstanding and settled general rule that courts will look to similar state statutes to supply a statute of limitations. *See North Star Steel Co. v. Thomas*, 515 U.S. 29, 33-34 (1995). A narrow exception to this general rule is that if the state statute is at odds with the purpose or operation of federal law, the courts may look to an analogous federal law in harmony with the immediate cause of action. *Id. at 34-35*. Because this is an immigration case, an area which is clearly dictated and defined by federal government and federal law, no appropriate state statute can be looked to in order to supply a limitations period. Accordingly, a limitations period in this case must be supplied by an analogous federal statute.

While the Administrator chose to use the limitations period from the Fair Labor Standards Act, § H-1B is far more analogous to the case at hand.¹⁵ Both the H-1A program under which this case arises and the H-1B program were intended to alleviate temporary shortages of U.S. workers. Furthermore, the H-1B program requires a labor condition application, similar to the attestation required in the H-1A program, where the employer must certify a number of conditions identical to those required in the H-1A program. Both programs require this certification to be filed with the Department of Labor. The penalties for violations of both programs are similar, if not identical. Finally, as the H-1A program has expired, foreign nurses may now petition for H-1B visas.

¹⁵ The limitations provision applicable to enforcement actions under the H-1B program reads, in relevant part:

No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively.

8 U.S.C. § 1182(n)(2)(A).

For these reasons, I find § H-1B to be most closely analogous to the INRA. Therefore, the one-year statute of limitations placed on H-1B complaints will be applied in this case. Accordingly, any alleged violations in this case that arose more than one year prior to the filing of the complaint which initiated this case, *i.e.*, the State Department telegram filed in April, 1995, are found to be untimely; and no back wages and civil money penalties can be ordered for violations which occurred prior to April, 1994.

2. *Extent of Liability for Violations of the Act*

The requirements for the admission of nonimmigrant nurses under the Act include the following:

(m) Requirements for admission of nonimmigrant nurses during five-year period

(1) The qualifications referred to in section 1101(a)(15)(H)(i)(a) of this title, with respect to an alien who is coming to the United States to perform nursing services for a facility, are that the alien -

(A) has obtained a full unrestricted license to practice professional nursing in the country where the alien obtained nursing education or has received nursing education in the United States or Canada:

(B) has passed an appropriate examination (recognized in regulations promulgated in consultation with the Secretary of Health and Human Services) or has a full and unrestricted license under State law to practice professional nursing in the State of intended employment; and

(C) is fully qualified and eligible under the laws (including such temporary or interim licensing requirements which authorize the nurse to be employed) governing the place of intended employment to engage in the practice of professional nursing as a registered nurse immediately upon admission to the United States and is authorized under such laws to be employed by the facility.

8 U.S.C. §1182(m)(1).

The 119 nurses sponsored by AMS in this case were not able to work as registered nurses immediately upon admission to the United States under the applicable State law, as required by the Act, because they were not fully qualified and eligible until they passed the Illinois licensing examination (JS 41). Since they could not work as registered nurses upon entry into the United States until they received RN licenses from the State of Illinois, the nurses were put to work as Certified Nurses Aides and/or Registered Nurses License Pending. In these positions they were paid a wage rate less than that of Registered Nurses. Respondent argues that because many of the nurses never worked as RNs (JS 44 and 45) the INRA is not applicable because it only covers registered nurses. Alternatively, Respondent argues that nurses who did not work as RNs should not be paid the same wage rate because they are they are not “similarly employed.”

The Act certainly applies to the nurses for whom the Respondent filed attestations whether or not they were qualified to work as RNs. The Act is undisputably clear that nonimmigrant nurses coming into the United States on H-1A visas must be fully qualified to engage in the practice of professional nursing immediately upon entry into the United States. The Act was clearly designed to alleviate the national shortage of Registered Nurses, not Certified Nurses Aides or any other classification of nurses. That Respondent sponsored nurses who were not qualified to begin work as RNs immediately upon entry into the U.S. is its burden to bear. Respondent attested that it would pay H-1A nurses the same wage rate as other registered nurses (Ex. C, D, E, F) and must be held to this attestation. Allowing otherwise would create a vast immigration loophole where employers could attest that they were bringing in qualified Registered Nurses and instead bring in unqualified foreign labor that may be willing to work as CNAs or in other nursing classifications for less money than United States citizens or legal aliens.¹⁶ This cannot be what Congress intended. Congress clearly did not want to depress the U.S. labor market by creating a glut of nurses aides or other such positions; rather, it wanted to alleviate specifically the RN nursing shortage, and it created the attestation process in pursuit of that goal. Accordingly, Respondent shall be held to all attestations filed for H-1A nonimmigrant nurses regardless of whether they were actually employed as RNs, including paying them at RN wage rates.

3. *Wage Rate*

In the attestations filed with the Department of Labor, AMS stated that the nonimmigrant nurses would be paid the wage rate for registered nurses “similarly employed” by the facility (Ex C, D, E, F). The average facility rate for entry level nurses was stipulated to be \$13.50 per hour (Ex N, JS 46). Respondent argues that there exists a genuine issue of material fact as to what the wage rate should be because the 119 nurses in question were not employed as RNs, but rather as CNAs or RNLPs, therefore they were not similarly employed to RNs working at the nursing facilities. The proper wage rate, according to Respondent, of nurses “similarly employed” would be the wage rate for RNs working as CNAs or RNLPs. Because no evidence exists as to this rate, Respondent argues there is a genuine issue of material fact.

I disagree. As stated before, Respondent represented in the attestations filed with the Department of Labor that the nonimmigrant nurses would be paid the entry level prevailing wage or entry level facility rate, whichever was higher. Both parties agree that the average entry level facility rate was \$13.50 per hour (JS 46). This is the rate that should have been paid to the H-1A nurses regardless of whether they were employed as RNs, RNLPs, or CNAs. Again, the Act makes clear that Congress only wanted to alleviate an RN shortage through the INRA -- not increase the foreign workforce of CNAs or RNLPs. Accordingly, to dissuade employers from sponsoring potentially less

¹⁶ This is particularly true in light of the fact that nurses sponsored on an H-1A visa are only permitted to work for the facility sponsoring them, giving nonimmigrant nurses no opportunity to compete generally in the United States labor market. Accordingly, they would potentially have to work for far lower wages than U.S. citizens or legal aliens who have the ability to compete in the market, which in turn could falsely depress wages for all workers.

costly foreign nursing workers in an attempt to avoid paying the market rate for domestic nurses, AMS must be held to the wage rate it attested it would pay the H-1A nurses. Therefore, AMS is liable for paying the nurses at a rate of \$13.50 per hour for the work they performed as CNAs and RNLPs.

As part of their joint stipulations, the parties agreed that “AMS, Inc. does not dispute the back wage computations on the WH-55 forms [Ex N] accurately reflect the back wages which would be due ...” if AMS was held responsible for paying the nonimmigrant nurses as registered nurses regardless of the duties they actually performed. *See* JS 46. As reflected on the WH-56 forms (EX M), the total back wages due would be \$787,734.80. However, these back wage calculations include back wages for work occurring prior to April, 1994; and based on my holding that AMS is not liable for back wages prior to April, 1994, the stipulated back wages are excessive.

Rather than personally trying to compute the sum of the stipulated back wages which arose from employment prior to April, 1994, I will give the parties the opportunity to work out new stipulations on this issue.

4. *Penalties*

Civil monetary penalties in the amount of \$119,000 were assessed against AMS based upon its failure to pay the requisite wage rate in accordance with the Act. The maximum penalty of \$1,000 per violation was assessed for each of 119 nurses who were not paid at the proper rate. While the Administrator acknowledges that AMS had no previous history of violations, it argues in part that the large number of workers affected by noncompliance (119), the underpayment of \$787,734.80 in wages, and the substantial financial gain AMS received due to the violations merit the maximum penalty. Respondent contends that the penalty is excessive and that the Administrator did not take into account mitigating circumstances.

The regulations set forth the factors that shall be considered in determining the amount of a civil monetary penalty:

(b) . . . the Administrator shall consider the type of violation committed and other relevant factors. The matters which may be considered include, but are not limited to, the following:

- (1) Previous history of violation, or violations, by the facility under the Act and subpart D or E of this part;
- (2) The number of workers affected by the violation or violations;
- (3) The gravity of the violation or violations;

(4) Efforts made by the violator in good faith to comply with the attestation or the State plan as provided in the Act and Subparts D and E of this part;

(5) The violator's explanation of the violation or violations;

(6) The violator's commitment to future compliance, taking into account the public health, interest or safety;

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury or adverse effect upon the workers.

29 C.F.R. § 504.410.

AMS has not stipulated to the appropriateness of the civil money penalties assessed by the Administrator. Rather, AMS argues that the assessed penalties are excessive. *See Motion to Dismiss* at 27-29. This issue does not seem to be susceptible to resolution through this summary decision. First, there appears to be a dispute between the parties over the accuracy of Respondent's proffered explanations for its violations of the Act. Second, it further appears that the credibility of Respondent's officers and/or employees may be at issue. Accordingly, it would be inappropriate to assess a civil money penalties without holding a hearing on that issue. It should also be pointed out that my ruling imposing a one-year statute of limitations on this case may reduce the number of violations for which civil penalties are being sought.

D. Summation

In conclusion, I hold that:

- 1) the telegram from the State Department was a complaint, triggering a valid investigation;
- 2) even absent a complaint, the Department of Labor retains the authority to investigate a suspected violation;
- 3) the applicable statute of limitations in this case is one year prior to the filing of a complaint with DOL. Accordingly, any alleged violations that arose more than one year prior to the filing of the State Department complaint are found to be untimely;
- 4) the Administrator shall amend the back wage calculations by deleting back wages for the period prior to April , 1994; and
- 5) a hearing will be held on the issue of the civil money penalties assessed by the Administrator.

IT IS ORDERED that the parties shall confer and report back to me within 14 days of receipt of this *Summary Decision* with proposed dates for convening the hearing on the civil money penalty issue.

JEFFREY TURECK
Administrative Law Judge