

**U.S. Department of Labor**

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**Issue Date: 25 November 2014**

CASE NO.: 2013-LCA-00025

In the Matter of

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

v.

**CORE EDUCATION AND  
CONSULTING SOLUTIONS, INC.**  
Respondent

Appearances: ORLY SHOHAM, Esq.  
SUSAN JACOBS, Esq.  
For the Prosecuting Party

IQBAL ISHAR, Esq.  
For the Respondent

Before: LYSTRA A. HARRIS  
Administrative Law Judge

**DECISION AND ORDER**

Background

This matter arises under the Immigration and Nationality Act H-1B visa program, 8 U.S.C. § 1101(a)(15)(H)(i)(b) (the “Act” or “INA”), and the implementing regulations at 20 C.F.R. Part 655, Subparts H and I.<sup>1</sup>

Statutory and Regulatory Framework

The H-1B nonimmigrant worker program is a component of the INA that permits the temporary employment of nonimmigrants to fill specialized jobs in the United States. *See* 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n); 20 C.F.R. Part 655, subparts H and I. An employer who seeks to hire a nonimmigrant in a specialty occupation must submit a Labor Condition Application (“LCA”) to the Department of Labor (“DOL”). The LCA sets forth, among other things, the rate of pay, period of employment, occupation, and information relating to the

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<sup>1</sup> Unless otherwise specified, the regulatory citations herein are to Title 20, Code of Federal Regulations.

nonimmigrant's work location. If the Labor Department certifies the LCA, the employer files a Petition for a Nonimmigrant Worker with the Department of Homeland Security's United States Citizenship and Immigration Services ("USCIS"). If USCIS approves the petition, the nonimmigrant worker may obtain a visa from the Department of State, allowing him to enter the country and work for a temporary period. *See* 8 U.S.C. § 1184(g)(4); 8 C.F.R. §§ 214.2(h)(2)(i)(D), (9)(iii)(A)(1), (13)(iii)(A), (15)(ii)(B).

On, or within, 30 days before the date the employer files the LCA, the employer must provide notice to "United States workers" of its intent to hire an H-1B worker by providing notice of the impending filing.<sup>2</sup> The employer must provide this notice to the bargaining representative of workers in the occupation in which the H-1B nonimmigrant will be employed. If there is no such bargaining representative, the employer must post such notices in two conspicuous locations for 10 days "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)(i)-(ii).

The notice must indicate the number of H-1B nonimmigrants sought; the occupational classification; the wages offered; the period of employment; the location(s) at which the H-1B nonimmigrant(s) will be employed; and that the LCA is available for public inspection at the employer's principal place of business in the U.S. or at the worksite. 20 C.F.R. § 655.734; *see also* 8 U.S.C. § 1182(n)(1)(C). "Place of employment" is defined as "the worksite or physical location where the work actually is performed by the H-1B . . . nonimmigrant," but the regulation includes several exceptions not applicable in this case. *See* 20 C.F.R. § 655.715. The LCA notice requirements are designed to protect American workers from displacement by H-1B workers. *See* 65 Fed. Reg. at 80110-11 (Dec. 20, 2009).

The DOL has authority to investigate complaints,<sup>3</sup> to enforce the H-1B visa program provisions by imposing civil money penalties, and to refer the employer to the Department of Homeland Security for disqualification from participation in the H-1B visa program for a prescribed period of time – a process known as "debarment."<sup>4</sup> Wage and Hour's Administrator may assess civil money penalties of up to \$1,000 per violation for notification violations under 20 C.F.R. § 655.734, if they are substantial, or \$5,000 per violation for notice violations if the violations are willful. *Id.* §§ 655.810(b)(1)(ii), (b)(2).

Pursuant to 20 C.F.R. § 655.805(c), a "willful failure" "means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to sections 212(n)(1)(A)(i) or (ii), or 212(t)(1)(A)(i) or (ii), or §§ 655.731 or 655.732." *See McLaughlin v. Richland Shoe*

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<sup>2</sup> A "United States worker" is defined as either, (1) a citizen or national of the United States, or (2) an alien who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under INA section 207, is granted asylum under INA section 208, or is an immigrant otherwise authorized by the INA or the Department of Homeland Security to be employed in the United States. 20 C.F.R. § 655.715.

<sup>3</sup> 8 U.S.C. § 1182(n)(2)(A); 20 C.F.R. § 655.700, 800.

<sup>4</sup> 8 U.S.C. § 1182(n)(2)(C); 20 C.F.R. §§ 655.700(A)(4), 655.810, 655.855.

*Co.*, 486 U.S. 128 (1988) (employer either knew or showed reckless disregard for the matter of whether the statute prohibited its conduct); *see also Trans World Airlines v. Thurston*, 469 U.S. 111 (1985). The relevant regulations do not include a definition of a "substantial violation." The ARB has recognized that an H-1B employer's compliance with the essential requirements of a statute or regulation may show that the employer "had not substantially failed to comply with the rule," and thus an ALJ could reasonably conclude that civil money penalties were not warranted in that case. *Santiglia v. Sun Microsystems, Inc.*, ARB No. 03-076, ALJ No. 2003-LCA-002, slip op. at 9 (ARB July 29, 2005).

The Act's H-1B visa program permits American employers to temporarily employ nonimmigrant aliens to perform specialized occupations 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 an LCA with the DOL before an alien will be admitted to the United States as an H-1B nonimmigrant worker. *Id.* § 1182(n)(1). In addition, notice of the filing of the LCA must be posted. *Id.* § 1182(n)(1)(C); 20 C.F.R. § 655.734 (the "LCA Notice Requirements"). The employer can satisfy the LCA Notice Requirements by "posting a notice 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)."<sup>5</sup>

As part of that LCA, the employer must attest that it:

(i) [i]s offering and will offer during the period of authorized employment to [H-1B employees] wages that are at least:

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application.

*Id.* §§ 1182(n)(1)(A)(i)(I), (II).

This wage requirement restricts American employers from paying foreign workers less than their American counterparts. The requirement thus acts as a disincentive to hiring nonimmigrant workers over American workers.

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<sup>5</sup> The employer can meet the LCA Notice Requirements electronically by making it available to "affected employees" by "any means it ordinarily uses to communicate with its workers about job vacancies or promotion opportunities." 20 C.F.R. § 655.734(a)(ii)(B).

The Immigration and Naturalization Service of the United States (“INS”) identifies and defines the jobs covered by the H-1B category and determines an individual’s qualifications.<sup>6</sup> DOL administers and enforces the LCA relating to the alien’s employment. 20 C.F.R. § 655.705. Employers who seek to hire individuals under an H-1B visa must first file an LCA with DOL, and certification of the application is required before INS approves the visa petition. 8 U.S.C. § 1101(a)(15)(H)(i)(b); *see also* 20 C.F.R. Part 655, Subparts H and I. In the LCA, the employer must represent the number of employees to be hired, their occupational classification, the actual or required wage rate, the prevailing wage rate and the source of such wage data, the period of employment and the date of need. *Id.* §§ 655.730-734; 8 U.S.C. § 1182(n).

After the LCA is certified, the employer submits a copy of the certified LCA to the INS along with the nonimmigrant alien’s visa petition to request H-1B classification for the worker. 20 C.F.R. § 655.700. If the visa is approved, the employer may hire the H-1B worker. Employers are required to pay H-1B workers beginning on the date when the nonimmigrant first is admitted to the United States pursuant to the LCA. *Id.* § 655.731(c)(6). Employers are required to pay H-1B employees the required wage for both productive and non-productive time.

Employment-related nonproductive time, or “benching,” results from lack of available work or lack of the individual’s license or permit. 8 U.S.C. § 1182(n)(2)(c)(vii); 20 C.F.R. § 655.731(c)(7)(i). The employer’s duty to pay the required wage ends when a bona fide termination occurs, but if the employer rehires the “laid off” employee, a bona fide termination is not established. 20 C.F.R. § 655.731(c). An employer need not pay wages for H-1B visa workers in nonproductive status at their voluntary request or convenience. *Id.*

The employer must notify the INS that it has terminated the employment relationship so that the INS may revoke approval of the H-1B visa. 8 C.F.R. § 214.2(h)(11). Additionally, the employer must notify the INS of the employment termination so that the visa petition may be canceled. 20 C.F.R. § 655.731(7)(ii); 8 C.F.R. §§ 214.2(h)(11), (4)(iii)(E).

The Act requires that an employer pay an H-1B worker the higher of its actual wage or the locally prevailing wage. Under the Act, an employer seeking to hire an alien in a specialty occupation on an H-1B visa must receive permission from the DOL, through filing a LCA, before the alien may obtain an H-1B visa. 8 U.S.C. §§ 1184(i)(1), 1182(n)(1).

The regulations specify how the H-1B worker must be paid. Under 20 C.F.R. § 655.731(c)(1), an employer must pay wages to the H-1B worker “cash in hand, free and clear, when due.” The regulations further specify that H-1B workers must be paid no less often than monthly. *Id.* § 655.731(c)(4). In terms of compensable hours, the regulations require an employer to pay the H-1B worker for the number of hours listed on the LCA, even if the H-1B worker is non-productive. *Id.* § 655.731(c)(5).

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<sup>6</sup> “Specialized occupation” is defined within the Act as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor degree or higher. 8 U.S.C. § 1184(i)(1).

## Statement of the Case and Procedural History

Pursuant to 20 C.F.R. § 655.815, the Deputy Administrator of the Wage and Hour Division (the “Administrator”) issued a Determination Letter to CORE Education and Consulting Solutions, Inc., (“Respondent” or “CORE”) on April 30, 2013. Administrator’s Exhibit-X-1. In that Determination Letter, the Administrator found that Respondent committed the following violations: (1) failure to pay wages as required under the INA and (2) “substantial failure to provide notice of the filing of LCAs. *Id.* The Determination Letter further noted that the back wages assessed as owed to eight nonimmigrant employees in the amount of \$94,728.30 had been paid regarding violation (1), but further assessed a civil money penalty in the amount of \$44,500 (\$500 each, for 89 LCAs) for violation (2).

Respondent filed a timely request for hearing before the Office of Administrative Law Judges (“OALJ”) on May 13, 2013. Pursuant to 20 C.F.R. §§ 655.825 and 655.835, I held a hearing on November 5, 2013 in New York, New York.

At the hearing, sworn testimony was taken of six witnesses: Suketu Dalal, Jennifer McGraw, Patrick Reilly, Jeffrey Cooper, Brian Keenan and Rupam Prasad. I also admitted the following into evidence: Administrative Law Judge’s Exhibits (“ALJX”) 1 and 2;<sup>7</sup> Administrator’s Exhibits (“AX”) 1 through 11; Respondent’s Exhibits (“RX”) 1 through 5; 8 through 10.<sup>8</sup> The hearing transcript (“HT”) is also part of the record. Each party timely submitted a post-hearing brief. This Decision and Order is based upon the evidence of record, the arguments of the parties, and an analysis of law.

## Contentions of the Parties

### The Administrator

The Administrator contends that Respondent’s failure to post notice at work sites where it placed H-1B employees constituted a substantial violation of the INA and its implementing regulations.

### Respondent

Respondent contends that it did substantially comply with the LCA posting requirements if the criteria set forth at 20 C.F.R. § 655.810(c) are properly considered.

## Factual Stipulations

As per ALJX-1 and RX-2, the parties have agreed, for the purposes of this proceeding that:

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<sup>7</sup> ALJX-1 and ALJX-2 are the prehearing statements submitted by the Administrator and Respondent, respectively. HT at 5.

<sup>8</sup> RX-6 and RX-7 were excluded from the hearing record. HT at 68-73.

1. CORE is a global education company, with its United States' headquarters in Atlanta, GA.<sup>9</sup>
2. CORE provides the majority of its H-1B employees to its direct clients (the "Direct Clients"), who in turn assign the H-1B employees to work at locations controlled by their clients (the "End-Clients").
3. The Wage and Hour Division ("WHD") conducted an investigation of CORE for the period of June 26, 2011 through June 25, 2012 (the "Investigation Period").
4. On April 30, 2013, the Administrator issued a determination letter to CORE alleging that CORE substantially failed to provide notice of filings of Labor Condition Applications ("LCAs") at each worksite where it place its H-1B employees, in violation of 20 C.F.R. § 655.734 (the "Determination Letter").
5. During the Investigation Period, CORE filed, and the Department of Labor approved, 101 LCAs identified on the list attached to the Determination Letter.
6. 89 of the H-1B employees sponsored by CORE in connection with the 101 LCAs were assigned to work for End-Clients at various locations throughout the counter which were neither owned nor operated by CORE ("End-Client Worksites").
7. 89 of the H-1B employees sponsored by CORE in connection with the 101 LCAs spent all of their working hours at End-Client Worksites.
8. During the investigation, WHD asked CORE to describe its policy and procedure for posting notice of filing of LCAs at End-Client Worksites.
9. During the Investigation Period, CORE's policy was to send its Direct Clients the following email:

*Dear Sir/Madam:*  
*Please find attached copy of the LCA filed for [H-1B worker's name]. Please have the beneficiary's end-client post this LCA at their premises for 10 business days. At the end of the 10<sup>th</sup> day please have them sign the notice of posting with posting dates and the name of the person who posted the notice and send it back to us promptly. Also, please have the end-client of the beneficiary confirm that this position will not displace any U.S. worker.*
10. During the Investigation Period, in those situations where CORE received no confirmation of posting notice of filing of LCAs, CORE did not ensure the posting of notice of filing of LCAs at the End-Client Worksites, and still permitted its H-1B employees to report to work at those worksites.
11. CORE was unable to provide notice of filing of LCAs at the End-Client Worksites by means of e-mail or by electronically posting on the Direct or End-Client's intranet site, home page, electronic bulletin board, or electronic newsletter.

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<sup>9</sup> In its post-hearing brief, Respondent asserts that its headquarters are in Princeton, NJ, but I find this geographical detail is immaterial. See Respondent's Post-Hearing Brief at 3.

12. CORE did not provide notice of the filing of 21 LCAs during the period of June 26, 2011 through April 30, 2013.<sup>10</sup>
13. With respect to each of those 21 LCAs, CORE permitted its H-1B employees to continue to work at each of the End-Client Worksites even though CORE received no confirmation of postings for those LCAs.
14. At the final conference with WHD on October 17, 2012, CORE provided confirmation of notice of the filing of 12 LCAs.
15. Between August 19, 2013 and September 19, 2013, CORE provided documentation showing that 21 H-1B employees resigned or changed employment status prior to the issuance of the Administrator's Determination Letter.

I find the record generally supports these stipulations which are therefore received into evidence.

#### Issue Presented

The issue presented in this case for resolution is as follows: whether Respondent's failure to provide notice of LCA filings during the period from June 26, 2011 to June 25, 2012 was "substantial."

#### Summary of Evidence

##### Witness testimony

##### Suketu Dalal

Mr. Dalal is employed with the DOL as a Wage and Hour investigator. He conducted an investigation of CORE in 2012, at issue in this matter. During the course of that investigation, he inspected public access files, spoke with human resource officials and other "team members" at CORE, as well as CORE's in-house and outside counsel. HT at 18. He received 12 posting confirmations from CORE in September 2012 for which CORE was given credit in the Administrator's April 30, 2013 Determination. HT at 24; AX-1; AX-5. Posting confirmations were also received by the counsel for the Administrator from CORE in June and August of 2013. AX-6 - AX-9; HT at 19.

He determined that CORE had committed posting and wage violations. HT at 19. During the investigation, CORE advised Mr. Dalal that it had filed 101 LCAs. HT at 20. CORE submitted a response to WHD request that it provide a list of the 101 H-1B employees along with their LCA numbers. AX-2. In Section H of the LCA (ETA Form 9034/9035E), CORE agreed to provide notice the place of employment for the H-1B nonimmigrant worker. *See e.g.*, AX-3 at 4.

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<sup>10</sup> A list of those LCA numbers is attached to Stipulations of Fact as Exhibit 1. *See* RX-2.

Mr. Dalal averred that CORE was required to post such notice for all 101 LCAs it filed during the relevant period. HT at 22. According to Mr. Dalal, “CORE’s actual posting policy was to try to post through vendors or through its employees at the worksite.” HT at 22. Specifically, Mr. Dalal averred that CORE’s human resource person asked that a mid-vendor or broker post the requisite notice of LCA filing at the worksite as described in a copy of an email he received from CORE. *See* AX-4. CORE allowed the H-1B employee to work at the worksite even when the End-Client did not confirm posting of the notice. HT at 23.

Mr. Dalal gave CORE credit for 12 postings because it confirmed that those notices were posted at the worksite or at the End-Client. HT at 24.

On cross-examination, Mr. Dalal conceded that posting confirmations received from CORE after the Administrator’s Determination letter was issued could have pertained to some of the 101 LCAs CORE filed during the Investigative Period. HT at 29; AX-2; AX-7. Mr. Dalal confirmed that he recommended a civil money penalty (“CMP”) and debarment at the conclusion of the investigation because CORE failed to provide 89 posting confirmations at the worksites. HT at 31. He averred that he conducted several investigations concerning H-1B violations but he could not recall in how many he recommended debarment. HT at 32.

On re-direct examination, Mr. Dalal testified that his investigation of CORE ended in 2012 and the notice of LCA filing covering an employment period from February 25, 2013 to February 25, 2016 occurred subsequent to that investigation. HT at 32; AX-6 at 11. He also confirmed that the District Director, Pat Reilly, determines whether a violation of the Act is substantial, and not he. HT at 33.

#### Jennifer McGraw

Ms. McGraw is a Regional Enforcement Coordinator for immigration cases with the WHD. HT at 34. She serves as a liaison between the investigators and managers in district offices with the national and regional solicitor’s office. She participated in the investigation of CORE at issue by providing guidance in response to questions from the district office.

She described the posting requirements under the H-1B regulations. Specifically, she testified that an employer is required to post notice of the filing of the LCA at the actual worksite where the H-1B employee will be performing the work regardless of whether the worksite is controlled by the sponsoring employer. HT at 35-36. According to Ms. McGraw, if the sponsoring employer fails to receive confirmation of postings or is unable to post at its End-Client sites, the sponsoring employer should not place the H-1B employee at that worksite. HT at 36.

Ms. McGraw described the purpose of the posting requirements under the INA. She averred that the posting notice provides U.S. workers at the actual worksite with information about the LCA which the employer has filed, as well as the number of H-1B workers the

employer seeks to hire, the actual job the H-1B worker will be performing at the worksite, the location of that job, the wages to be received for that job, and the period of employment for the H-1B worker at that worksite. *Id.* The posting notice also outlines the procedure for filing a complaint with DOL if there is believed to be a violation of the Act.

Ms. McGraw conceded that the applicable regulations do not define what constitutes a substantial failure to comply with the posting requirements. HT at 37. She described WHD's policy in determining whether posting violations are substantial:

It is our policy to apply a general tolerance factor of twenty percent; meaning that for instance, in the case of posting notice, if an employer failed to post notice more than twenty percent of the time, we would consider that to be a substantial . . . violation.

HT at 37.

Ms. McGraw answered negatively when asked if WHD applies the factors to be used in assessing a civil money penalty in determining whether a posting violation is substantial. HT at 38. She maintained that those factors are used only after it has been determined whether a substantial violation has occurred. *Id.* Ms. McGraw also answered negatively when asked if the applicable regulations require consideration of whether U.S. workers were displaced or adversely affected in determining whether a substantial violation occurred. *Id.* She confirmed that a posting confirmation provided for an LCA which was not part of WHD's original investigation would not be considered in determining whether a substantial violation occurred during the Investigation Period. HT at 38-39.

On cross-examination, Ms. McGraw could not provide the specific number of complaints filed in her district by U.S. workers alleging violation of posting requirements. HT at 40-41. She also could not identify the basis for use of the twenty percent rule she described as the WHD policy for determining a substantial violation. HT at 42. Ms. McGraw stated that either the primacy of the violation or the number of employees involved is not considered in determining a substantial violation occurred. HT at 42-43. She noted that the District Director determines the civil money penalty to be assessed; the statute determines debarment, i.e., if the violation is one that requires debarment by statute, then WHD provides notification to the Department of Homeland Security once there is a final order. HT at 43-44.

#### Patrick Reilly

As the District Director of Southern NJ with the WHD, Mr. Reilly manages investigators and support staff in enforcing provisions of number of different labor laws including the provisions of the INA relating to H-1B labor standards. HT at 47. He signed the Determination Letter issued in the instant matter. *Id.*; *see also* AX-1. He determined the civil money penalties assessed with regard to the posting violation found. HT at 48.

Mr. Reilly averred that 20 C.F.R. 655.810 provided that \$1,000 is the highest penalty amount to be assessed per “substantial” violation but that the “starting point in this case was \$500 per violation.” HT at 48. He further testified that the regulations at 20 C.F.R. § 655.810 outline seven factors to be considered in determining the amount of the civil money penalty to be assessed: the previous history violation; the number of workers affected by the violation or violations; the gravity of the violation or violations; the efforts made by the employer in good faith to comply with the regulations; the employer’s explanation of the violation or violations; the employer’s commitment to future compliance; the extent to which the employer achieved financial gain due to the violation or potential financial loss or injury to the worker.<sup>11</sup> HT at 49-50.

Mr. Reilly maintained that he considered the history of violations, the number of affected workers, the gravity of the violation, or the extent to which the employer achieved financial gain as “neutral,” rather than enhancing or mitigating, factors in assessing the civil money penalty to be imposed; he considered those factors as neutral. HT at 52; HT at 58. He did not consider the efforts of CORE to comply with the regulations or CORE’s explanation for its non-compliance as mitigating factors because the business model under which it operated afforded a “limited opportunity” for CORE to comply, i.e., CORE lacked control over the end user and lacked control to assure compliance. HT at 53-54. Mr. Reilly acknowledged that CORE presented a compliance plan dated December 7, 2012, describing the steps it intended to take to comply with the H-1B notification requirements and that a compliance plan “may be a basis for mitigating.” HT at 56. Mr. Reilly maintained that he did not consider CORE’s compliance plan as a mitigating factor because he perceived “some weaknesses in the proposal,” i.e., its reliance on the employee to provide the LCA for posting. *Id.* He also noted that there was no expressed agreement by CORE not to place a worker at a worksite if a posting of the LCA was not possible. HT at 58.

On cross-examination, Mr. Reilly had difficulty explaining how the third factor is applied in assessing the civil money penalty, noting that it is more than the number of workers affected but also the “impact” and “the dimensions of the violation.” HT at 59. He conceded there was no specific definition of gravity of the violation. *Id.* However, Mr. Reilly noted that “in considering gravity, we knew there were all these instances, all these locations where U.S. workers hadn’t been notified, and we thought that was significant.” HT at 60. He acknowledged that he was unable to assert that any specific worker complained to DOL about the lack of notification, but there was “knowledge that there were these 89 locations where workers didn’t get the notification they should have.” *Id.* He also acknowledged that he had no idea about the number of employees at each of those locations. HT at 60-61. Mr. Reilly averred that, in calculating civil money penalties, whether an employer has direct control over its client is not a factor of and in itself, but is considered as part of the efforts made by the employer in good faith

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<sup>11</sup> 20 C.F.R. § 655.810(c) provides that the Administrator consider the type of violation committed and other relevant factors including but not limited to these seven which are enumerated therein. *Id.* § 655.810(c)(1)-(7).

to comply. HT at 63. Mr. Reilly stated that CORE's business model "made it difficult, if not impossible, to make the necessary notification." HT at 64.

In addressing CORE's proposed compliance plan at AX-11, Mr. Reilly reiterated his concern about its provisions that CORE would strive to have its clients post notifications of LCA filings and that CORE H-1B employees would agree not to report to work until 11 days after the confirmed posting date. HT at 65-66. His concern precluded his consideration of the proposed compliance plan as a mitigating factor in assessing the civil money penalty to be imposed. HT at 66. Finally, Mr. Reilly averred that he did not review a draft of the compliance plan before it was signed, but his Assistant District Director, Jack Kelly, did. HT at 66-67. He agreed that the final compliance plan incorporated changes suggested before it was signed. HT at 67.

#### Jeffrey Cooper

Mr. Cooper testified on behalf of CORE. He is employed by CORE as its in-house counsel since December 2011. HT at 73-74. Generally, he refers all immigration matters to outside counsel with whom he coordinates efforts. HT at 74. With regard to the WHD investigation at issue in the instant matter, Mr. Cooper helped oversee the gathering of records and attended two meetings (an initial and final meeting) with the WHD investigator. *Id.* Those records included the public access files that need to be kept by CORE on each of its H-1B employees. HT at 75-76. He was also involved in drafting a compliance plan (which he identified as RX-8) at the request the WHD investigator. HT at 76.

According to Mr. Cooper, the compliance plan provided that CORE would include terms in its contracts with vendors and in its employment agreements with employees that would require posting of the LCA notices and absence from until posting confirmations were received. HT at 77.

Mr. Cooper averred that he was unaware of any failure to respond to document requests made during the WHD investigation conducted in the instant matter. HT at 79. He confirmed that the back wages deemed owed during that investigation were paid. *Id.*

At the final meeting with the WHD investigator, Mr. Cooper recalled being told that debarment was typically reserved for multiple offenders and not first-time violators, but that debarment was not a decision made by the investigator. HT at 78.

#### Brian Keenan

Mr. Keenan testified that he has been the president of the staffing division of CORE since July 2012. HT at 82. While he set general policies relating to compliance related to H-1B employment, his subordinate, Rupam Prasad, had responsibility for the "day-to-day activities of completing paperwork and working with immigration attorneys." *Id.* With regard to the WHD

investigation of CORE at issue, Mr. Keenan was involved in reviewing the corrective action plan and ensuring compliance with it. HT at 83.

At the time of his testimony at hearing, Mr. Keenan maintained CORE was at 100 percent compliance with the posting requirements under the INA; he noted that CORE was changing its business model to increase focus on having “a tier-one [direct] client base which gives [it] better access to the client and ability to ensure that the postings have been done properly.” HT at 85. He also averred that CORE now required documentation to show that the posting has occurred at the client location prior to commencement of employment. *Id.*

In response to my questioning, Mr. Keenan acknowledged that he had no involvement in CORE’s H-1B posting requirement compliance in 2011. HT at 86.

### Rupam Prasad

Ms. Prasad is employed with CORE as a vice-president of operations, managing the day-to-day operations of its Princeton, NJ office. HT at 87-88. She coordinates all paperwork related to immigration, ensuring compliance with applicable rules and regulations. HT at 88. She helped respond to document requests made as part of the WHD investigation conducted in the instant matter. *Id.*

She averred that RX-4 includes a list of the 101 LCAs which were part of the WHD investigation at issue in the instant matter, as well as a list of the LCAs for which confirmations were provided. HT at 88-89. According to Ms. Prasad, the list of 101 LCAs at issue is segregated as follows: around 16 LCAs for employees who resigned during the period from October 2012 and April 2013; around 6 employees whose status would have changed, i.e., H-1B visas expired, Employment Authorization Card or “green card” obtained. HT at 89. Ms. Prasad also stated that CORE submitted 17 posting confirmations at the October 2012 meeting with WHD investigator and others were submitted in June and July 2012. *Id.*

Ms. Prasad identified RX-5 as an example of an email sent by Reeta Roy for all LCAs filed by CORE. HT at 90. Ms. Prasad averred that Ms. Roy sends all copies of LCAs to CORE clients for positing. *Id.*

CORE has received LCA posting confirmations for its new hires since August 2012. *See* RX-9. According to Ms. Prasad, RX-10 constitutes all the amended LCA posting confirmations for CORE’s existing employees some of whom are part of the 101 employees but had their H-1B visas extended sometime between August and October 2012. *Id.*

Ms. Prasad averred that, after the October 2012 meeting with the WHD investigator, CORE obtained 27 additional LCA posting confirmations related to the 101 LCAs at issue, which it did not provide to the WHD. HT at 91; 93. She acknowledged that those additional posting confirmations were not submitted because CORE lacked the proper documentation: the

confirmations were obtained “over the phone.” HT at 92. Documentation regarding these additional 27 posting confirmations was provided in June 2013 – after WHD issued its Determination Letter. *Id.*

Out of the 21 employees for whom CORE had no LCA postings as referenced at RX-2, Ms. Prasad averred that one resigned, one, received a green card and 2 had their H-1B visas amended and posting confirmations were obtained for the amended H-1Bs. HT at 95. *See also* RX-10.

On cross-examination, Ms. Prasad acknowledged that the posting confirmations for employment beginning in 2013 occurred subsequent to the Investigation Period. HT at 96. She also acknowledged awareness of the requirement of the need to post twice for any amended or renewed LCAs: once for the original LCA and again if the LCA is amended or renewed. HT at 96-97.

In response to my questioning about the procedure occurring after an email requesting posting confirmation such as RX-5 is sent, Ms. Prasad averred that if no response is received, then “we follow up within ten business days to get the posting confirmation from the client, and they send us these LCA posting confirmations.” HT at 98-99. Only new employees were not allowed to work if CORE failed to receive posting confirmation. HT at 99.

On re-direct examination, Ms. Prasad stated that, if it is an employee continuing employment, “we try to talk to the employee and ask him to talk to the manager and see if we can get [the LCA notice] posted.” HT at 100. On re-cross examination, Ms. Prasad confirmed that this is Respondent’s current policy. *Id.* She also confirmed that H-1B employees worked at End-Client worksites without notice of posting prior to the WHD investigation. HT at 101.

#### Documentary evidence

##### The Administrator

The following exhibits were received into evidence:

- AX-1 – Administrator’s Determination Letter dated April 30, 2013 with Summary of Violations and Remedies
- AX-2 – email list of Respondent’s 101 H-1B with active LCA numbers as of August 2012
- AX-3 – LCAs filed by Respondent
- AX-4 – email dated August 24, 2012 from Reeta Roy, CORE Human Resources Manager, to Rupam Prasad and Surya Kuruturi requesting End-Client posting of the LCA filed for Shasidhar Chittaru
- AX-5 – emails covering the period from August 16, 2012 to September 21, 2012 from Reeta Roy requesting End-Client postings of LCAs

- AX-6 – CORE LCA notice postings dated May – June 2012; November – December 2012; email exchanges regarding confirmation of LCA notice postings dated March 2013; CORE LCA notice postings February – April 2013
- AX-7 – CORE LCA notice postings dated March – April, June – August, November – December 2011; March – May, 2012; August – October 2012; December 2012 – January 2013; February – May 2013
- AX-8 – CORE LCA notice postings dated May, June, and July 2013
- AX-9 – CORE LCA notice postings March 2013 and April 2013
- AX-10 – email dated May 23, 2013 from Harischandra Reddy to Reeta Roy and Rupam Prasad advising of his resignation from CORE effective May 31, 2013
- AX-11 – letter dated December 7, 2012 from the Employment Standards Administration, WHD, to Suketu S. Dalal submitting a Compliance Plan on behalf of CORE pursuant to the Final Meeting held on October 17, 2012

Respondent

The following exhibits were received into evidence:

- RX-1 – Administrator’s Determination Letter dated April 30, 2013 with Summary of Violations and Remedies
- RX-2 – Stipulations of Fact signed by the parties
- RX-3 – email chain between the parties including CORE’s list of 101 LCAs at issue in the instant matter
- RX-4 – letter from Respondent’s counsel to Administrator’s counsel dated August 19, 2013 including a spreadsheet outlining the status of the notice postings of 101 LCAs at issue
- RX-5 – email from Reeta Roy dated August 23, 2012 requesting CORE’s Direct Client to ensure the End-Client posting of LCA notice for Chitharu Sasidhar
- RX-8 – letter dated December 6, 2012 to Suketu S. Dalal, Employment Standards Administration, WHD, from CORE’s in-house counsel, including a Compliance Plan on behalf of CORE designed to ensure LCA notice postings at the work sites of each of CORE’s H-1B employees
- RX-9 – copies of 25 notices of LCA filings CORE posted for H-1B employers hired after its final meeting with WHD for the period from November 14, 2012 to August 27, 2013 11/14/12 to 8/27/13
- RX-10 – copies of 19 notices of LCA filings CORE posted for its H-1B employees continuing after its final meeting with WHD
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Findings of Fact/Conclusions of Law

CORE is a global IT firm headquartered in the United States. ALJX-1, ¶ 2(a); HT at 84. As part of its business model, CORE hires and then assigns the majority of its H-1B employees

to its Direct Clients, who then assign the H-1B employees to their clients, or CORE's End-Clients. ALJX-1, ¶ 2(b). Suketu Dalal, an WHD Investigator, conducted an investigation of CORE covering the Investigation Period of June 26, 2011 through June 25, 2012. ALJX-1, ¶ 2(c); HT at 17.

During the Investigation Period, CORE filed, and DOL certified, 101 LCAs (the "Original LCAs"). ALJX-1, ¶ 2(e); AX-1 at 6-8; AX-2. In each of these LCAs, CORE attested that it would comply with the applicable regulations, including the notice obligation. *See, e.g.*, AX-3 at 4, Section H; AX-3 at 13, Section H(4); HT at 21-22. During the Investigation Period, CORE asked its Direct Clients, via e-mail, to request their End-Clients to post notice at each End-Client worksite where CORE's H-1B employees were placed, and to confirm said posting. ALJX-1, ¶ 2(i); *see also* AX-4. In those situations where CORE received no posting confirmation from its Direct Clients, CORE still permitted its H-1B employees to work at End-Client worksites. ALJX-1, ¶ 2(j), ¶ 2(k).

At the final conference of the WHD investigation, held on October 17, 2012, CORE provided posting confirmations to WHD. ALJX-1, ¶ 2(n); ALJX-2, ¶ (c)(3); AX-5; HT at 18-19; HT at 23-24. WHD credited CORE for the 12 posting confirmations, reducing CORE's number of violations from 101 to 89. ALJX-1, ¶ 2(n); HT at 24. On April 30, 2013, the Administrator issued a Determination Letter to CORE finding that CORE substantially failed to provide notice of the filing of 89 LCAs at worksites where it placed H-1B employees, in violation of 20 C.F.R. § 655.734. ALJX-1, ¶ 2(d); AX-1.

CORE submitted additional documents to the Administrator's counsel, i.e., DOL Solicitor's Office subsequent to the issuance of the Administrator's Determination Letter. On June 24, 2013, CORE submitted 19 "additional" posting confirmations (the "June 2013 Submission"). AX-6; HT at 18-19. On August 20, 2013, CORE submitted 51 "additional" posting confirmations (the "August 2013 Submission"). AX-7, AX-8, AX-9; HT at 18-19. For the period between August 19, 2013 and September 19, 2013, CORE submitted documentation showing that 21 CORE H-1B employees, connected to 21 of the Original LCAs, resigned or changed employment status prior to the issuance of the Administrator's Determination Letter. ALJX-1, ¶ 2(o).

The notice requirement of an LCA mandates that employers post notice of their intent to hire nonimmigrant 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 nonimmigrants are sought, at each place of employment where any H-1B nonimmigrant will be employed. *Id.* § 655.734(a)(1)(ii)(B). The posting requirement mandates that employers note and retain the dates when, and locations where, the notice was posted and shall retain a copy of the posted notice. *Id.* § 655.734(b).

The requirements of providing notice of the filing of the LCA required Respondent to post notices at the places in which its employees worked. This means that Respondent was required to post notice at the site location of the end-client user in which each of its H-1B employees worked.

It is undisputed that Respondent failed to post notice of its LCA filings during the Investigative Period. Respondent disputes that its failure to comply was substantial. Specifically, Respondent disputes the number of posting confirmations it obtained during the Investigative Period and for which it should therefore receive credit.

Respondent, through its witness Ms. Prasad, maintains that it provided proof of posting for 17 of the 101 Original LCAs at CORE's final meeting with the WHD investigator in October 2012 and while WHD "rejected" 5 as insufficient, it should nonetheless get credit for the rejected posting confirmations as demonstrative of a good faith effort to comply with the INA posting requirements." Respondent's Post-Hearing Brief at 7. CORE also contends that it provided the Administrator, through his counsel, 39 additional posting confirmations in June 2013 and August 2013; 27 of which pertained to the 101 Original LCAs. *See* AX-6 and AX-7. Ms. Prasad maintained that these additional posting confirmations were available prior to the Determination Letter, but provided after its issuance because the WHD did not ask for them HT at 76-77. Mr. Cooper averred that it was CORE's understanding that the focus was on future compliance with the INA posting requirements. HT at 91-92. Thus, CORE contends that a total of at least 44 posting confirmations of its Original LCAs existed during the Investigation Period. Respondent's Post-Hearing Brief at 10.

Respondent also contends that 21 employees referenced in the Original LCAs had either resigned or changed their employment status before the Determination Letter. RX-2; RX-4 Therefore, CORE argues that it should only have been held responsible for posting notice of filing 80 and not 101 Original LCAs.

There is no support in the applicable statute or regulations which would relieve CORE of the posting requirements for its 21 H-1B employees who resigned or changed employment status subsequent to the filing of LCAs. Indeed, as the Administrator asserts, the required notice posting generally precedes the filing of the LCA and always precedes the placement of an H-1B nonimmigrant worker. 20 C.F.R. § 655.734(a). Administrator's Post-Hearing Brief at 16.

Therefore, I find that CORE's argument, which is, in effect, that it substantially complied with its posting requirements if its posting obligations were limited to 80 Original LCAs, lacks merit.

#### CORE's June and August 2013 submissions to the Administrator

Mr. Dalal testified that the Administrator's counsel, i.e., the Office of the Solicitor, received posting confirmations from CORE in June and August of 2013. HT at 19. He identified AX-6 through AX-9 as those posting confirmations. HT at 18-19.

Nineteen posting confirmations are contained in AX-6. Review of AX-6 reveals that only 2 of these 19 posting confirmations relate to the Original LCAs, contrary to Respondent's spreadsheet provided with a cover letter dated August 19, 2013 (RX-4) and to Ms. Prasad's testimony (HT at 95-96). See AX-6 at 22-23. A comparison of AX-6 and RX-9 (which Respondent described as "[c]opies of 25 notice of filing LCAs that Respondent posted for **New** employees hired after the final meeting with WHD" at ALJX-2 at 9 (emphasis in original)), shows that 14 of the "additional" posting confirmations in CORE's June 2013 Submission are for new H-1B employees and are therefore unrelated to the Original LCAs. See also HT at 90. Therefore, by Respondent's own admission, 14 of the posting confirmations in its June 2013 Submission are irrelevant. HT at 38-39.

Three other posting confirmations in AX-6 are for new employees, i.e., employees CORE hired after the Investigation Period at issue. It is clear that these 3 posting confirmations are for new employees because their periods of employment begin in 2013 which is subsequent to WHD's investigation. I find that these 3 posting confirmations do not pertain to the 101 Original LCAs and are, therefore, irrelevant. AX-6 at 19, 20, 24. Moreover, I note that whether these 3 posting confirmations are for renewed or extended LCAs is also irrelevant. See HT at 90; 96. As Ms. Prasad acknowledged on cross-examination, the applicable regulations require an employer to post notice once for an initial LCA and again for the renewed or extended LCA. HT at 96-97. CORE proffered no evidence to support finding that it posted notice of the initial LCAs filed.

I find AX-6 provided 2 additional posting confirmations related to the Original LCAs. AX-6 at 22-23.

Fifty-one additional posting confirmations from CORE are contained in AX-7, AX-8 and AX-9. Twenty-eight of the posting confirmations reference periods of employment beginning in 2013 which is subsequent to WHD's investigation. AX-7 at 10, 11, 26, 27-28, 29, 30, 31; AX-8; AX-9. I find those 28 posting confirmations are then unrelated to the Original LCAs and, therefore, irrelevant. Furthermore, AX-7 at 12 contains an LCA number not listed in the Administrator's Determination Letter. Compare AX-7 at 12, with AX-1 at 6-8. I also note that 7 of the posting confirmations in AX-7 fail to list corresponding LCA numbers, so I am unable to determine whether these posting confirmations relate to the 101 Original LCAs. AX-7 at 1-6, 9.

In addition, 10 of the posting confirmations in CORE's August 2013 submission fail to include a posting date which also precludes attribution to the 101 Original LCAs. AX-7 at 15-18; 20-25.

I find AX-7, AX-8, and AX-9 only provided an additional 5 posting confirmations related to the 101 Original LCAs, contrary to RX-4 and Ms. Prasad's testimony.

I find that CORE should be credited with the 7 additional posting confirmations it provided the Administrator. The Administrator does not contend that these postings did not occur during the Investigation Period, only that confirmations were not provided prior to the Determination Letter. Even if CORE were credited with the 7 additional posting confirmations it provided the Administrator in June and August of 2013 – after the issuance of the Determination Letter – I find Respondent would still have been in violation of the regulatory posting requirement for the Investigation Period at issue. Specifically, CORE would then be deemed to have not ensured notice posting for 82 out of the 101 Original LCAs.

*Respondent substantially failed to comply with requirement to post notice of LCA filing*

The INA provides that if an employer substantially fails to meet the notice requirements, the Secretary shall notify DHS of that failure and may impose civil money penalties (“CMPs”) on the employer. 8 U.S.C. § 1182(n)(2)(C)(i); 20 C.F.R. § 655.810(b)(1)(ii). However, neither the INA nor the regulations define “substantial failure.” *Santiglia v. Sun Microsystems, Inc.*, ARB. No. 03-076, 2005 WL 1827744, at \*6 (ARB July 29, 2005). The DOL declined to define “substantial failure,” reasoning that the concept of substantial violation has been in the [INA] since 1991 and that such a determination is “necessarily fact-specific, based upon the facts and the circumstances of the particular case.” *Interim Final Rule - Preamble*, 65 Fed. Reg. 80110, 80177 (Dec. 20, 2000).

With regard to the determination of substantial violation, Ms. McGraw averred that it is the policy of the WHD “to apply a general tolerance factor of 20%,” i.e., “if an employer failed to post notice more than 20% of the time, we would consider that to be a substantial... violation.” HT at 37. Respondents contend that there is no basis in the applicable regulations for WHD's 20% tolerance factor. Respondent's Post-Hearing Brief at 6. That lack of regulatory basis for its 20% tolerance factor is undisputed by the Administrator. However, as the Administrator noted in his Post-Hearing Brief, WHD uses a twenty percent tolerance factor in different contexts. *See, e.g.*, 29 C.F.R. §§ 786.100, 786.150, 786.1, and 786.200 (reflecting a twenty percent limitation on the performance of nonexempt work under the Fair Labor Standards Act (“FLSA”) for switchboard operators, rail or air carrier employees, and taxicab drivers, respectively); 29 C.F.R. §§ 552.5 and 552.6 (reflecting a twenty percent limitation on nonexempt work to determine whether a casual babysitter or companion is exempt from FLSA minimum wage and overtime requirements); 29 C.F.R. § 783.32 (reflecting a twenty percent limitation on nonexempt work for seamen). The Eighth Circuit has upheld WHD's twenty percent tolerance factor in this context. *See, e.g., Fast v. Applebee's Intern, Inc.*, 638 F.3d 872, 880-881 (8th Cir. 2011).

Posting violations may also be deemed substantial under two alternative approaches: the “effects” approach and the “substantial compliance” approach. *See Adm’r v. Prism Enterprises of Cent. Fla.*, 2001-LCA-0008, slip op. at 15 (ALJ Wood) (June 22, 2001); *Santiglia*, 2005 WL 1 827744, at \*6. I find CORE’s posting violations are also substantial under the “substantial compliance” approach.<sup>12</sup> *See Santiglia*, 2005 WL 1 827744, at \*6. The “substantial compliance” approach focuses on the degree to which the employer’s conduct violated the regulation. *Id.* The traditional doctrine of substantial compliance holds that a technical breach of a contractual term or minor violation of a statutory requirement may be excused where the party complies “with the essential requirements, whether of a contract or of a statute.” Black’s Law Dictionary 1428 (6<sup>th</sup> ed. 1990). *See, e.g., Santiglia*, 2005 WL 1 82774, at \*6. Under this approach, the Benefits Review Board has been reluctant to impose CMPs for technical breaches of the regulation (e.g. posting the required notice at *one* location at the worksite, rather than at *two* locations as required). *Id.* Here, I find CORE failed to comply with the express statutory and regulatory notice requirements, as well as the purpose of those requirements.

Contrary to Respondent’s assertion that the Administrator must consider the CMP factors listed in 20 C.F.R. § 655.810(c) in order to establish a substantial failure, I note the plain language of the statute and regulations impose no such requirement. Respondent’s Post-Hearing Brief at 5. Under the H-1B statutory and regulatory scheme, it is necessary first to determine that a violation is substantial *before* assessing CMPs in light of the relevant factors. *See* 8 U.S.C. §1182(n)(2)(C)(i)(I); 20 C.F.R. § 655.810(c); HT at 38.

Respondent also errs in its assertion that the Administrator must show that U.S. workers were adversely affected in order to establish a substantial failure, citing *Adm’r v. Camo Technologies, Inc.*, ALJ Case No. 2010-LCA-00023 (Dec. 22, 2010). Respondent’s Post-Hearing Brief at 10-11. I agree with the Administrator that CORE’s reliance on *Camo* is misplaced: *Camo* involves *willful* failure to post notice – an entirely different legal standard than *substantial* failure to post notice.<sup>13</sup> *See Camo Technologies*, 2013 WL 5719249, at \*1.

A showing that U.S. workers were adversely affected is not required either under statute or regulation in order to establish a substantial compliance failure. *Cf. Cyberworld Enter. Technologies Inc. v. Napolitano*, 602 F.3d 189, 201-03 (3d Cir. 2010) (affirming the imposition of sanctions under both statute and regulations for Cyberworld’s failure to make the

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<sup>12</sup> The “effects” approach looks at the likely effects that the violation has on the employees whom the regulation was intended to protect – the greater number of employees likely affected, the more likely the violation will be deemed substantial. *Prism Enterprises*, 200 1-LCA-0008, slip op. at 15 (“[since] there were only two employees besides Blake and they were only there for a small part of the period . . . I find that the failure to post does not constitute a ‘substantial failure’ . . .”). I disagree with the Administrator’s assertion in his Post-Hearing Brief that CORE’s posting notice violations are substantial under the “effects” approach because the evidence of record fails to address the number of U.S. workers affected as a result of CORE’s violations: the Administrator’s argument that CORE’s posting notice violations affected “likely hundreds of U.S. workers” is conclusory and unsupported. Administrator’s Post-Hearing Brief at 15.

<sup>13</sup> A “willful failure” is a knowing failure or reckless disregard by the employer to comply with the INA and implementing regulations. 20 C.F.R. § 655.805(c).

displacement inquiry of its secondary and third-party contractors, regardless of whether there was an actual impact on any workers). Indeed, the posting requirement at issue in this matter is not dependent on actual impact on U.S. workers. The required notice posting generally *precedes* the filing of the LCA and always *precedes* the placement of an H-1B nonimmigrant worker. 20 C.F.R. § 655.734(a).

In conclusion, I find Respondent has substantially failed to comply with the posting requirement at 20 C.F.R. § 655.734(a).

*Administrator's assessment of CMPs should be modified*

Under 20 C.F.R. § 655.840(b), an ALJ has the authority to “affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator.” 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)).

The regulations specify seven factors that may be considered in determining the amount of the civil money penalties to be assessed: (1) previous history of violations by the employer, (2) the number of workers affected, (3) the gravity of the violations, (4) the employer’s good faith efforts to comply, (5) the employer’s explanation, (6) the employer’s commitment to future compliance, and (7) 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)(1)-(7).

The Administrator may assess a penalty not to exceed \$1,000 per violation for displacement of U.S. workers, *a substantial violation pertaining to notification*, labor condition application specificity, recruitment of U.S. workers, or a misrepresentation of a material fact on an LCA. 8 U.S.C. §1182(n)(2)(C)(i); 20 C.F.R. §655.810(b)(emphasis added).

Here, Mr. Reilly, the District Director, acting on behalf of the Administrator, assessed a \$500 base CMP for each posting violation. HT at 48. Consistent with WHD’s custom and practice, he calculated the base CMP by reducing the maximum allowable penalty by 50%. *Id.*

According to Mr. Reilly’s un rebutted testimony, WHD typically uses the first, third, and seventh factors as aggravating factors. HT at 50; 52-53; 58. The first factor relates to the employer’s previous history of violations. 20 C.F.R. § 655.810(c)(1). Because this was found to be CORE’s first violation, the Administrator did not increase the base CMP. HT at 50-52. The third factor relates to the gravity of the violations. *Id.* § 655.810(c)(3). The Administrator did not increase the base CMP because, although CORE’s violations affected a large number of workers, the violations did not result in dire consequences. HT at 53. Finally, the seventh factor relates to the extent to which the employer achieved financial gain due to the violations, or potential financial loss, injury or adverse effect with respect to other parties. *Id.* § 655.810(c)(7).

It may be assumed that CORE realized financial gain as a result of its violations (i.e. by placing its H-1B employees during the Investigative Period that it would not have otherwise been permitted to place, and thus collecting fees from its clients for such placements), the Administrator did not increase the base CMP because CORE's financial gain was not found to be an "egregious situation" such as one where the employer was taking significant amounts of money from its employees. HT at 58-59.

Mr. Reilly averred that WHD typically uses the second, fourth, fifth and sixth factors as mitigating factors. HT at 52-53; 55. The second factor relates to the number of workers affected by the violations. 20 C.F.R. § 655.810(c)(2). The Administrator did not decrease the base CMP because it was deemed that CORE's failure to post notice of 89 out of 101 LCAs affected a large number of workers. HT at 52; 60. The fourth factor relates to the employer's efforts to comply with the law. 20 C.F.R. § 655.810(c)(4). The Administrator did not decrease the base CMP because CORE's business model made compliance with the law impossible without the assistance of its End-Clients, who have no obligation to post notice under the INA. HT at 53-54; 61; 63-64. *See also Adm'r v. Sirsai, Inc. and Vijay Gunturu*, 2011-LCA-00001, slip op. at 43 (ALJ July 27, 2012). Brian Keenan, CORE's President, Consulting and Staffing Group, acknowledged that CORE "wouldn't be here if we didn't have an issue in the past" and that Respondent is now making efforts to change its End-Client business model. HT at 84-85. Additionally, contrary to Ms. Prasad's hearing testimony, CORE began attempting to ensure notice posting in August 2012 –after WHD began its investigation. *See AX-4; RX-5. See also* HT at 90 (Ms. Prasad testified that her office "[s]ends this [standard e-mail asking CORE End-Clients to post notice of LCA filing] for all LCAs, all *new* LCAs that we filed." (emphasis added)).

The fifth factor relates to the employer's explanation of the violation, i.e., whether the violation occurred due to unforeseeable or unpreventable disasters. 20 C.F.R. § 810(c)(5); HT at 54. The Administrator did not decrease the base CMP because CORE's explanation, that its business model prevented it from controlling its End-Clients, was foreseeable and preventable. *See* HT at 54-55. Finally, the sixth factor relates to the employer's commitment to future compliance with the law. 20 C.F.R. § 810(c)(6); HT at 55. The Administrator did not decrease the base CMP because CORE's proposed compliance plan, submitted to WHD in December 2012, places responsibility on H-1B employees to post notice and fails to explicitly guarantee that CORE will prevent its H-1B employees from working at End-Client worksites where notice posting is unconfirmed. AX-11 at 2; HT at 56-58; 77.

I agree with the Administrator's assessment that CMPs should be imposed, as well as his consideration of the relevant mitigating or aggravating factors. I disagree, however, with the number of violations for which the CMPs have been assessed. As discussed above, CORE should receive credit for 7 additional posting confirmations of the Original 101 LCAs it presented subsequent to the Investigation Period. The Administrator does not argue that these 7 additional postings did not occur during the Investigation Period; he argues that confirmations of

those postings provided after the WHD determination. I find it is appropriate to consider the additional 7 posting confirmations. Therefore, I find the Administrator's assessment should be reduced by \$3,500, for a total of \$41,000.

### Debarment

Under the plain language of the statute and regulation, 8 U.S.C. § 1182 (n)(2)(C)(i) and 20 C.F.R. § 655.810 (d)(1), the one year disqualification sanction is a mandatory penalty for a violation of the provisions in 20 C.F.R. § 655.810 (b)(1)(i)-(iii). While the statute indicates the Secretary "may" impose other administrative remedies, the INA also states that (1) the Secretary "shall" notify the Attorney General of a failure to comply with the LCA conditions and (2) upon such notification, the Attorney General "shall not" approve the employer's applications for one year.

Giving the term "shall" its ordinary and natural meaning, neither the Secretary nor the Attorney General has the discretion to modify or reduce the one year disqualification. When Congress intends to provide such discretion, a statute will include specific language to that effect. For example, in the Service Contract Act, 41 U.S.C. § 354 (a), the Secretary has the specified discretion not to impose a three year contract debarment in "unusual circumstances." Absent any such provision in this case, and considering the significant purpose behind the statutory and regulatory language, the protection of U.S. workers, the term "shall" imposes a mandatory obligation on the Secretary and Attorney General.

Pursuant to 20 C.F.R. 655.855, DOL's Employment and Training Administration ("ETA") and the Department of Homeland Security ("DHS") shall be notified of the occurrence of the posting violations addressed herein when a determination becomes final in this matter. DHS (formerly the Attorney General), upon notification, would then be required to deny any petitions filed by CORE under § 204 (8 U.S.C. §1154) and § 214(c) (8 U.S.C. § 1184(c)) of the INA for a period of at least one year from the date of the receipt of the notification. *See* 8 U.S.C. § 1182(n)(2)(C)(ii)(11).

### Conclusion

For the foregoing reasons, I affirm the Administrator's determination that Respondent substantially failed to post a notice of filing of LCAs in violation of 20 C.F.R. § 655.805(a)(5). I modify the Administrator's determination of civil money penalties which I find are appropriately and reasonably assessed against Respondent. The Administrator will notify ETA and DHS of the final determination of any violation requiring that DHS not approve petitions filed by CORE in accordance with the provisions of 20 C.F.R. § 655.855.

**SO ORDERED.**

LYSTRA A. HARRIS  
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: U.S. Department of Labor, Administrative Review Board, Room S-5220 FPB, 200 Constitution Ave, NW, Washington, DC 20210.

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 for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. *See* 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board’s receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.