



In the Matter of:

U.S. DEPARTMENT OF LABOR, ADMINISTRATOR,  
WAGE & HOUR DIVISION, EMPLOYMENT  
STANDARDS ADMINISTRATION,

CASE NO. 94-ARN-1

DATE: June 28, 1996

PLAINTIFF,

NURSES PRN OF DENVER, INC., NURSES PRN  
SUNCOAST, INC.,

COMPLAINANTS,

v.

HCA MEDICAL CENTER HOSPITAL, LARGO, FLORIDA,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD<sup>1/</sup>

#### ORDER OF REMAND

This case arises under the Immigration Nursing Relief Act of 1989, 8 U.S.C. §§ 1101(a)(15)(H)(I)(a) and 1182(m)(1994)(INRA) and its implementing regulations, 29 C.F.R. Part 504, Subparts D and E (1995); 20 C.F.R. Part 655, Subparts D and E (1993). The purpose of the INRA is "to assist in alleviating the national shortage of registered nurses by . . . establishing

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<sup>1/</sup> On April 17, 1996, the Secretary of Labor delegated authority to issue final agency decisions under, *inter alia*, the Immigration Nursing Relief Act of 1989, and the implementing regulations, to the newly created Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978 (May 3, 1996)(copy attached). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. A copy of the final procedural revisions to the regulations, 61 Fed. Reg. 19982, implementing this reorganization also is attached.

conditions for the admission of foreign registered nurses during a 5-year period.”<sup>2/</sup> H. R. Rep. No. 288, 101st Cong., 1st Sess. 1 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1894. The issues on review in this case are (1) whether any of Complainants’ employees, who were displaced by H-1A nonimmigrant alien nurses, are entitled to an award of back pay and (2) whether the case should be remanded to the Administrative Law Judge (ALJ) for findings concerning any back pay due Respondent’s employees. *See* Secretary of Labor’s Notice of Intent to Review the Decision and Order of the Administrative Law Judge, June 22, 1995.

### FACTUAL BACKGROUND

Respondent HCA Medical Center Hospital, Largo, Florida, is an adult acute care facility that specializes in cardiology and provides facilities for open heart surgery. Complainants, Nurses PRN of Denver, Inc. and Nurses PRN Suncoast, Inc., are contractors that provide temporary nursing services.<sup>3/</sup> Until October 7, 1989, or “boycott day,” Respondent used Complainants’ nursing services. Thereafter, Respondent increased its own nursing staff and sharply decreased its use of contract nurses. Respondent no longer uses Complainants’ services.

In April 1993, Respondent applied to the Employment Training Administration, U.S. Department of Labor, to renew its INRA H-1A petition for purposes of employing four nonimmigrant alien nurses. In order to gain approval, a health care facility must attest to a need for the nurses, *i.e.*, that there would be a substantial disruption, through no fault of the facility, in the delivery of health care services without H-1A nurses. 8 U.S.C. § 1182(m)(2)(A)(I). This element may be met by demonstrating at least one of the following: (1) a current nurse vacancy rate of seven percent or more, (2) an unutilized bed rate of seven percent or more, (3) the elimination or curtailment of essential health care services, or (4) the inability to implement established plans for needed new health care services. 29 C.F.R. § 504.310(d)(2)(I). A petitioning facility also must attest that the wages and working conditions of U.S. nurses would not be affected adversely and that it had taken significant steps to recruit and retain U.S. nurses and thus reduce reliance on foreign nurses. 8 U.S.C. § 1182(m)(2)(A)(ii), (iv).

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<sup>2/</sup> This “H-1A” pilot program for the admission of nonimmigrant alien nurses on the basis of health care facility attestation was subject to a sunset date of September 1, 1995. Despite this limitation, H-1A obligations and the Department of Labor’s enforcement authority continue until expiration of extant H-1A visas issued prior to the sunset date. Section 3(d), P.L. No. 101-238, 103 Stat. 2099 (amendment shall apply to classification petitions filed for nonimmigrant aliens only during five-year period beginning on first day of ninth month after enactment date of December 18, 1989). *See* 29 C.F.R. § 504.310(p); 20 C.F.R. § 310(p).

<sup>3/</sup> “PRN” is an abbreviation for *pro re nata* which means “as needed” or “as necessary.” Complainants supply nurses to hospitals, doctors’ offices, nursing homes and clinics on a daily, weekly, or monthly basis or for several months at a time. They also provide home health care services. Hearing Transcript (T.) 169-170.

To demonstrate need, Respondent attested to a nurse vacancy rate of 12 percent, an unutilized bed rate of 32.5 percent and the elimination or curtailment of essential health care services. Respondent stated:

[O]ur hospital continues with a very high utilization of critical care beds, in which once a critical care bed becomes open, it is quickly filled, usually on the same day. If this hospital had additional critical care beds . . . these beds would be filled, due to the high patient acuity<sup>4/</sup> . . . . The required nurse to patient staffing ratio is greater for critical care beds due to the patients [sic] acuity. With the current shortage of nurses that are critically care skilled, staffing the current as well as additional beds that could be utilized becomes difficult without the resource of foreign nurses. Therefore, our particular facility has and continues to curtail the essential healthcare services of . . . intensive care beds and critical care unit beds. [T]hese beds come at a premium for the physicians who order these services, and since [they] are normally filled at 100% occupancy, other beds within the facility which utilize telemetry services (the next best medical option) are then utilized.

Respondent's Exhibit (Exh.) 22 at 2. In addition, Martha Micallef, Respondent's chief nurse executive, testified that Respondent had been required to close its emergency room on more than one occasion because it lacked nursing staff for critical care beds. Hearing Transcript (T.) 554-557. Respondent also attested that it had not laid off any nurses during the preceding year. 8 U.S.C. § 1182(m)(2)(A); 29 C.F.R. § 504.310(c)(2)(ii) and (d)(1).

In addressing labor safeguards, Respondent attested that the employment of nonimmigrant alien nurses would not adversely affect the wages and working conditions of U.S. nurses similarly employed and that its nurses would be paid at least the prevailing wage. 8 U.S.C. § 1182(m)(2)(A)(ii) and (iii); 29 C.F.R. § 504.310(e).

In addressing its responsibilities under the program, Respondent attested that it had taken steps designed to recruit and retain nurses who were U.S. citizens or immigrants in order to remove dependence on nonimmigrant nurses, that it was operating or otherwise financing a training program for nurses, that it was providing career development programs or otherwise facilitating health care workers to become nurses, that it was providing support services to free nurses from administrative or other non-nursing duties, that it was providing opportunities for meaningful salary advancement by nurses and that it had provided notice of the attestation to its nurses. 8 U.S.C. § 1182(m)(2)(A)(iv)-(vi) and (B). *See* 29 C.F.R. § 504.310(c)(2) and (d); H. R. Rep. No. 288, 101st Cong., 1st Sess. 4-7 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1894, 1897-1900.

Complainants subsequently complained that Respondent had misrepresented several attestation elements, and after a Labor Department investigation, conducted by the Administrator of the Wage and Hour Division, Employment Standards Administration, the case proceeded to hearing. The ALJ ultimately found that Respondent's attested nurse vacancy rate of 12 percent or

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<sup>4/</sup> "Acuity" is an industry measure of the severity of illness. Rushing deposition at 35.

more was incorrect and that the correct rate was less than seven percent. Decision and Order (D. and O.) at 3. Respondent thus had misrepresented a material fact contrary to 8 U.S.C. § 1182(m)(2)(E)(iv) and 29 C.F.R. § 504.310(d)(2)(A). *Id.* at 4. The ALJ also found that Respondent's notice to its nurses of the attestation did not contain all required information and that Respondent had neglected to maintain all required documentation in support of the attestation (29 C.F.R. §§ 504.310(I)(2) and 504.350(b)). *Id.* at 4-5. In this regard, Respondent "failed to meet a condition attested to . . . ." 8 U.S.C. § 1182(2)(E)(iv). Finally, the ALJ found that although Respondent had complied with the INRA's prevailing wage provisions regarding base wage rates, it may not have paid the correct shift and specialty unit differentials because it did not elicit this information from the State Employment Security Agency (SESA) as required under 29 C.F.R. § 504.310(e)(1). *Id.* at 7-8. Accordingly, Respondent "violated the condition attested to" under 8 U.S.C. § 1182(m)(2)(A)(ii) by failing to obtain complete information from the SESA establishing the prevailing wage.

The ALJ assessed a total civil money penalty of \$2,250. He also stated that if the failure to ascertain wage differentials "resulted in the Respondent's failure to pay any of its nurses the proper prevailing wage the Respondent should pay those nurses back wages in the correct amount." D. and O. at 8.

## DISCUSSION

Respondent declined to contract with Complainants for temporary nursing services during the pendency of the 1993-1994 attestation. Complainants now assert that their nurses, who were "displaced" by Respondent's H-1A nurses, are entitled to an award of back pay because the attestation was defective.

The ALJ found that Complainants' employees were not parties to the action and thus were not entitled to recovery. D. and O. at 10. Complainants argue that they initiated the action "on behalf of two corporate entities and on behalf of the entities' displaced nurses." Complainants' Brief at 6.

The regulations provide that "[a]ny aggrieved person or organization may file a complaint of a violation of [the INRA] . . . . Upon the request of the complainant, the Administrator shall, to the extent possible under existing law, maintain confidentiality regarding the complainant's identity . . . ." 29 C.F.R. § 504.405(b). After the Administrator conducts an investigation and issues a determination, any "interested party" may request an administrative hearing. 29 C.F.R. § 504.420. If a "complainant wishes to be a party to the administrative hearing proceedings . . . the complainant shall then waive confidentiality." 29 C.F.R. § 405(b). Hearings are conducted pursuant to 29 C.F.R. Parts 504 and 18. 29 C.F.R. § 504.425(a). A party "includes a person or agency named or admitted as a party to a proceeding . . . ." 29 C.F.R. § 18.2(g). Specific rules pertain to party designation. 29 C.F.R. § 18.10.<sup>5/</sup>

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<sup>5/</sup> Persons or organizations wishing to participate must petition for party status. Any petition must state  
(continued...)

As evidence of its nurses' intent to participate in the case, Complainants point to the post-hearing affidavit of Walter Theodore Kaatman and the post-hearing deposition of Cynthia Fortner. Mr. Kaatman stated: "I authorized Ann Elaine Castro, P.A. [Complainants' attorney] to represent my interest in a Complaint filed pursuant to the Immigration Nursing Relief Act against HCA Largo Medical Center, asking that my identity remain confidential for fear of retaliation." Complainants' Exh. 17. Mrs. Fortner's deposition includes the following exchange:

Q. Why are you here today?

A. I was asked to come to give some statements.

Q. By who? Who asked you?

A. I believe I talked to Julie on the phone.

Q. Is she your lawyer?

A. (Shaking head.)

Q. She doesn't represent you?

A. No.

Q. Does Ms. Castro represent you?

A. No.

Q. When did they contact you?

A. About a week ago.

Q. That's the first time you spoke to them?

A. Uh-huh.

Q. That's the first time you heard of this proceeding?

A. Yes.

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<sup>5</sup>(...continued)

petitioner's interest in the case, the manner in which participation will contribute to case disposition, the representative who will appear at the hearing, the issues which petitioner wishes to raise and whether petitioner intends to present witnesses. 29 C.F.R. § 18.10(c). The ALJ is required to provide each party with written notice of each petition granted. 29 C.F.R. § 18.10(d).

Q. You had no inclination to come forward before that time, did you?

A. No. . . .

Q. Have you hired an attorney?

A. No, I haven't.

Q. Have you, on your own behalf, attempted to join this proceeding?

A. They've -- yes. I've talked to Lynette Dorton, and she talked to me about it, and I said I didn't mind.

Q. Didn't mind what?

A. If they called me.

Complainants' Exh. 15 at 32-34. The record does not show that either individual participated in the complaint or the hearing apart from providing the affidavit and deposition. They neither applied for nor were granted party status under 29 C.F.R. § 18.10(c). In these circumstances, Complainants' nurses are not "part[ies] to the administrative hearing proceedings . . . ." 29 C.F.R. § 504.405.

Admittedly, Respondent's employees, who stand to recover if not paid the prevailing wage, similarly are not parties. Party status is not a prerequisite for these employees because the attestation expressly ensures their recovery. 29 C.F.R. § 504.310(e)(1) ("To meet the requirement of no adverse effect on wages, the facility shall attest that it shall pay each nurse of the facility at least the prevailing wage for the occupation in the geographic area."). In contrast, Complainants argue that its nurses are due back pay because they wrongfully were displaced under an attestation which never should have been approved -- damage which is not expressly compensable. Accordingly, party status was necessary to press the claim of these nurses.

Finally, Complainants, the only named parties, are not parties whose loss can be remedied under the INRA. In their complaint, Complainants allege annual sales between Respondent and themselves of \$535,555 in 1987, \$640,201 in 1988 and \$399,493 in 1989. "In 1990, the practice and pattern of annual sales between the parties abruptly halted. Throughout 1991, 1992, and the first six months of 1993 [Complainants'] annual sales at Largo Medical Center has remained at zero." ALJ Exh. 1. Any recovery here would represent damages awarded for loss of Complainants' business. The INRA, which authorizes civil money penalties and back pay for failure to pay the prevailing wage, makes no provision for compensatory or exemplary damages. *See* 8 U.S.C. § 1182(m)(2)(E)(iv) and (v); H. R. Rep. No. 288, 101st Cong., 1st Sess. 8 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1894, 1901; 29 C.F.R. § 504.410(a) and (c).

The remaining issue on review is whether this case should be remanded to the ALJ to determine whether Respondent failed to pay any of its nurses the prevailing wage (including pay

differentials) during the period of its 1993-1994 attestation and, if so, the amounts due. Complainants and Respondent joined in requesting that the case be remanded, and the Administrator does not object to a remand. Accordingly, this case IS REMANDED to the ALJ for further proceedings consistent with this opinion.

SO ORDERED.

DAVID A. O'BRIEN  
Chair

KARL J. SANDSTROM  
Member

JOYCE D. MILLER  
Alternate Member