U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

**In the Matter of:**

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| **ADMINISTRATOR, WAGE AND, HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR** | **ARB CASE NOS. 2019-0079, 2019-0083** |
| **PROSECUTING PARTY,** | **ALJ CASE NOS. 2019-LCA-00013, 2019-LCA-00002** |
| **v.** | |
| **BROADGATE, INC.,** | **DATE: April 20, 2021** |
| **RESPONDENT.** | |
| **and** | |
| **ADMINISTRATOR, WAGE AND, HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR** | |
| **PROSECUTING PARTY,** | |
| **v.** | |
| **SPATE BUSINESS SOLUTIONS, L.L.C.,** | |
| **RESPONDENT.** | |

**Appearances:**

***For the Prosecuting Party:***
**Kate S. O'Scannlain, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus, Esq., Paul L. Frieden, Esq.; Quinn Philbin, Esq.; *Office of the Solicitor, U.S. Department of Labor;* Washington, District of Columbia**

***For the Respondents:***
**Michael E. Piston, Esq.; *Law Office of Michael E. Piston*; New York, New York**

**Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges***

## DECISION AND ORDER AFFIRMING IN PART AND REVERSING AND REMANDING IN PART

PER CURIAM. These cases arise under the H-1B visa program provisions of the Immigration and Nationality Act (INA or Act), as amended, and its implementing regulations.[1] On August 7, 2019, a U.S. Department of Labor (DOL) Administrative Law Judge (ALJ) issued a Decision and Order affirming, in part, and reversing, in part, the Wage and Hour Division's (WHD) Administrator's Determination that Broadgate, Inc. (Broadgate) violated the INA. [2] On August 12, 2019, a different ALJ issued a Decision and Order affirming, in part, modifying, in part, and reversing, in part, the WHD's Administrator's Determination that Spate Business Solutions, L.L.C. (Spate) violated the INA.[3] The WHD's Administrator (Administrator) petitioned for review concerning the Broadgate D. & O. with the Administrative Review Board (ARB or the Board). Spate also petitioned the Board for review concerning the Spate D. & O. We reverse, in part, and remand, in part, the Broadgate D. & O., and affirm the Spate D. & O.

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[1] 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2014) and 8 U.S.C. § 1182(n) (2013). The H-1B visa program's implementing regulations are found at 20 C.F.R. Part 655, subparts H and I (2016).

[2] *Adm'r v. Broadgate, Inc.*, ALJ No. 2019-LCA-00013 (Aug. 7, 2019) (Broadgate D. & O.).

[3] *Adm'r v. Spate Business Solutions*, L.L.C., ALJ No. 2019-LCA-00002 (Aug. 12, 2019) (Spate D. & O.).

## BACKGROUND

### 1. Background in *Broadgate*

A nonimmigrant H-1B visa worker filed a complaint with the WHD alleging that he was underpaid wages during his employment with Broadgate.[4] The wage complaint was investigated by the WHD, and on or about December 28, 2018, the District Director of the Detroit Wage and Hour office (Detroit District Director) issued a determination entitled in part "Administrator's Determination Pursuant to 20 C.F.R. Part 655 H-1B Specialty Occupations" (Administrator's Determination).[5] The District Director found that Broadgate had violated the Act and Regulations,[6] and imposed a two-year period of debarment, ordered Broadgate to pay back wages to the H-1B worker, and assessed civil money penalties for several of the charged violations.[7]

Broadgate requested a hearing before the Office of Administrative Law Judges (OALJ) and disputed all violations alleged and remedies sought by the Administrator.[8] Prior to the hearing, the ALJ accepted the parties' joint stipulations concerning Violations #1, #3, and #4.[9] The ALJ determined that Broadgate's only challenge before him was whether it had "willfully and substantially failed to

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4 Broadgate D. & O. at 2.

5 *Id.* at 2-3; Broadgate Joint Exhibit (Broadgate JX) 16.

6 The Administrator's Determination listed the following charges: (1) Broadgate failed to pay wages as required in violation of 20 C.F.R. § 655.731; (2) Broadgate willfully and substantially failed to provide notice of the filing of LCA(s) in violation of 20 C.F.R. § 655.734; (3) Broadgate failed to make available for public examination the LCA and necessary documents at the employer's principal place of business or worksite in violation of 20 C.F.R. § 655.760(a); and (4) Broadgate failed to maintain documents, as required by 20 C.F.R. §§ 655.731(b), 738(e), 655.739(i), and/or 655.760(c). Broadgate JX 16.

7 The Administrator's Determination required Broadgate to pay back wages in the amount of $31,696.80 to the H-1B worker for Violation #1, imposed $66,176.00 in civil money penalties and a period of debarment of "at least two years" for Violation #2, and imposed $1,848.00 in civil money penalties for Violation #4. Broadgate JX 16.

8 Broadgate D. & O. at 4.

9 *Id.*; Broadgate ALJ Exhibits (Broadgate ALJ EX) 3-5.

provide notice of the filing of [labor condition applications (LCAs)] in violation of 20 C.F.R. § 655.734."[10]

In its Pre-Hearing Statement, Broadgate argued that the Detroit District Director was not delegated or re-delegated the authority to issue the Administrator's Determination.[11] The Administrator objected to Broadgate's Pre-Hearing Statement contending that Broadgate's arguments were affirmative defenses, and that Broadgate failed to raise these defenses in its request for a hearing.[12] The ALJ overruled the Administrator's objection, but permitted the Administrator to submit additional evidence and held a supplemental hearing concerning the delegation of authority issue.[13] Ultimately, the Administrator offered no witnesses, but offered two exhibits at the supplemental hearing, which were admitted into the record.[14] After the close of discovery, the ALJ discovered a potentially relevant delegation directive from the recently confirmed Administrator in a labor law publication and re-opened discovery pertaining to the directive.[15] The ALJ admitted a May 9, 2019 e-mail in which the Administrator revoked prior delegations of enforcement authority into the record.[16]

The ALJ issued the Broadgate D. & O. on August 7, 2019. As to Violation #2, the ALJ found that Broadgate willfully failed to post LCA notices on at least

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10 Broadgate D. & O. at 4-5.

11 *Id*. at 5. Specifically, Broadgate contended that the Detroit District Director was not delegated the authority: (1) to deliberate and determine what Violations would be charged against it; (2) to assess civil money penalties against it; (3) to order that it would be debarred from future participation in the H-1B program; and (4) to issue the Administrator's Determination.

12 *Id*. at 5-9.

13 *Id*. at 9-12.

14 *Id*. at 11.

15 *Id*. at 11-12.

16 *Id*. Although this e-mail was admitted into the record as Respondent's Exhibit (Broadgate RX) 4, it was not forwarded to the ARB with the rest of the record. Either way, the May 9, 2019 e-mail was sent well after Broadgate's alleged violations and delegation challenge.

fourteen occasions as required by 20 C.F.R. 655.734.[17] Although the ALJ found that Broadgate willfully failed to post the LCA notices, the ALJ reversed the Administrator's Determination because he found that the Detroit District Director was not delegated or re-delegated the authority required to issue the Administrator's Determination.[18]

**2. Background in *Spate***

A nonimmigrant H-1B visa worker filed a complaint with the WHD that he was underpaid wages during his employment with Spate. The wage complaint was investigated by the WHD, and on or about September 25, 2018, the Detroit District Director issued the Administrator's Determination. The District Director found that Spate had violated the Act and Regulations,[19] and imposed debarment. The District Director ordered Spate to pay back wages to the H-1B worker and assessed civil money penalties for several of the charged violations.[20]

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17 Broadgate D. & O. at 13-17.

18 *Id*. at 34-37.

19 The Administrator's Determination listed the following charges: (1) Spate willfully failed to pay wages as required in violation of 20 C.F.R. § 655.731; (2) Spate willfully misrepresented a material fact of the LCA in violation of 20 C.F.R. § 655.730; (3) Spate failed to provide notice of the filing of LCA(s) in violation of 20 C.F.R. § 655.734; (4) Spate failed to make available for public examination the LCA and necessary documents at the employer's principal place of business or worksite in violation of 20 C.F.R. § 655.760(a); and (5) Spate failed to cooperate in the investigation as required in violation of 20 C.F.R. § 655.800(c). Spate D. & O. at 3; Spate Joint Exhibit (Spate JX) 2.

20 The Administrator's Determination required Spate to pay back wages in the amount of $12,882.35 or $12,774.35 to the H-1B worker and imposed $3,384.00 in civil money penalties for Violation #1; imposed $7,520.00 in civil money penalties, ordered Spate to comply with 20 C.F.R. § 655.730 by withdrawing the LCA and submitting a new LCA with correct information, and imposed debarment for Violation #2; ordered Spate to comply with 20 C.F.R. § 655.734 and post notice of the LCA filings for Violation #3; ordered Spate to comply with 20 C.F.R. § 655.760(a) and to make certain supporting documentation available immediately for Violation #4; and imposed $831.60 in civil money penalties and ordered Spate to comply with 20 C.F.R. C.F.R. § 655.800(c) and provide accurate payroll information for Violation #5. Spate D. & O. at 4; Spate JX 2.

Spate requested a hearing before the OALJ and disputed all violations alleged and remedies sought by the Administrator. Spate also argued that the Administrator was required to prove, as a part of her case-in-chief, that either she performed certain duties herself, or those duties were properly delegated and performed pursuant to such delegation. Spate further argued that since the Administrator failed to meet her burden of proof, that the Detroit District Director could not issue the Administrator's Determination.[21]

The ALJ issued the Spate D. & O. on August 12, 2019. In contrast to the ALJ in Broadgate D. & O., this ALJ found that the Detroit District Director was presumed to have been delegated or re-delegated the authority to issue the Administrator's Determination. The ALJ then modified the back wages owed to the H-1B worker to $13,188.27, less deductions required by law, but affirmed the remainder of Violation #1,[22] reversed Violation #2, and affirmed Violations #3, #4, and #5. The ALJ also ordered the Administrator to notify the Department of Homeland Security (DHS) that Spate would be debarred from the visa program for at least two years.

### 3. Petitions for review before the Administrative Review Board

The Board received a petition for expedited review of the Broadgate D. & O. from the Administrator on August 21, 2019. Subsequently, the Board received a petition for review of the Spate D. & O. from Spate on September 11, 2019. Due to the similarity of the issues raised and contradictory conclusions by the ALJs in their respective decisions, the Board consolidated the two appeals for purposes of this decision. For the reasons discussed below, we reverse, in part, and remand, in part, the Broadgate D. & O., and affirm the Spate D. & O.

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[21] Spate D. & O. at 4.

[22] The Administrator's Determination in *Spate* used roman numerals for the alleged violations; however, considering the Administrator's Determination in *Broadgate* used numbers for the alleged violations, the Board will also use numbers to maintain uniformity in this decision.

## JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's decision pursuant to 20 C.F.R. § 655.845.[23] Under the Administrative Procedure Act (APA), the ARB has plenary power to review an ALJ's factual and legal conclusions de novo.[24]

## DISCUSSION

The sole issue on appeal is whether the Detroit District Director had the authority to issue H-1B determination letters. Broadgate and Spate (collectively Respondents) allege that the Detroit District Director was not delegated or re-delegated the authority to issue the Administrator's Determinations. Conversely, the Administrator contends that the Detroit District Director was delegated or re-delegated the authority to issue the Administrator's Determinations.

### 1. H-1B visa program and delegation of authority overview

The DOL is an Executive agency of the United States.[25] The Secretary of Labor (Secretary) is the head of the DOL and governs the operations within the agency. Final agency decisions issued under the statutory authority of the DOL may be issued by the Secretary or by his or her designee under a written delegation of authority.[26]

The H-1B visa program was created by amendments to the INA.[27] The INA requires the Secretary to "establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition

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[23] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[24] *Lubary v. El Floriditia*, ARB No. 2010-0137, ALJ No. 2010-LCA-00020 (ARB Apr. 30, 2012).

[25] 5 U.S.C. § 101.

[26] 29 C.F.R. § 2.8.

[27] Pub. L. 101-649 Stat. 4978.

specified in an application . . . or a petitioner's misrepresentation of material facts in such an application."[28] Thus, the Secretary has primary enforcement authority over the H-1B visa program.

Prior to or while the alleged violations occurred in both cases, the Secretary published Secretary's Order No. 01-2014 expressly delegating the Secretary's statutory H-1B enforcement power to the Administrator.[29] The Order delegates to the Administrator the authority to enforce LCAs "for employment of nonimmigrant professionals (H-1B, H1-B1, and E-3 visas)."[30] The Order further delegates the authority and assigned responsibility "for carrying out the employment standards, labor standards, and labor-management standards policies, programs, and activities of the" DOL to be performed by the Secretary under the INA, including 8 U.S.C. 1182(n)(2) and (t)(3), relating to the enforcement of LCAs for employment of nonimmigrant professionals.[31] Section 7, "Redelegation of Authority," provides that the Administrator may re-delegate the authorities delegated from the Secretary within the Order.[32]

The Administrator presides over a program created for the investigation and enforcement of violations of the H-1B visa program. The regulations which govern the investigative and enforcement processes are found in 20 C.F.R. Part 655, Subparts H and I.[33] The regulations state that "the Administrator shall perform all the Secretary's investigative and enforcement functions under section 212(n) and (t) of the INA and this subpart I and subpart H of this part."[34] 20 C.F.R. § 655.715 defines the term "Administrator" as "the Administrator of the . . . [WHD] and such authorized representatives as may be designated to perform any of the functions of

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28 8 U.S.C. § 1182(n)(2)(A).

29 Secretary's Order No. 01-2014, 79 Fed. Reg. 77,527 (December 24, 2014).

30 *Id*.

31 *Id*.

32 *Id*.

33 These Regulations were first issued on December 20, 2000 (65 Fed. Reg. 80, 233), and amended on November 2004 (60 Fed. Reg. 68,228).

34 20 C.F.R. § 655.800(a)

the Administrator under subpart H or I."[35] Thus, so long as an individual is designated to perform a duty assigned to the Administrator under Part 655, subpart H or I, the individual has the legal authority to perform such duty. However, this does not answer whether the Detroit District Director was delegated or re-delegated the authority to issue the Administrator's Determinations.

**2. The burden of proof and the presumption of regularity**

The Administrator argues that Respondents bear the burden to prove that the Detroit District Director was not designated to issue the Administrator's Determinations as required by the presumption of regularity.[36] Conversely, Respondents contend that the Administrator bears the burden to prove that the Detroit District Director was designated to issue the Administrator's Determinations because the APA precludes the application of the presumption.[37]

The ALJs in *Broadgate* and *Spate* adopted different approaches in applying (or not applying) the presumption of regularity, and subsequently, placing the burden of proof on a party. In *Broadgate*, the ALJ did not apply the presumption because it was created by Article III courts to buffer the judicial branch's scrutiny of executive branch decision-making. This approach stands in contrast to a DOL ALJ's inquiry into enforcement decisions made within the same branch.[38] The ALJ also cited 20 C.F.R. § 655.840(a) which required him to make a record and a merits-based decision. The ALJ concluded that this limited him from employing the presumption.[39] As a result, the ALJ placed the burden of proof on the Administrator to show that the Detroit District Director was delegated or re-delegated the authority to issue the Administrator's Determination.[40]

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35 20 C.F.R. § 655.715.

36 Administrator's Opening Brief (Administrator's Broadgate Brief (Br.)) at 9-15; Administrator's Response Brief (Administrator's Spate Response) at 6-10.

37 Broadgate Response at 4-6; Spate Brief (Br.) 6-8.

38 Broadgate D. & O. at 37.

39 *Id*.

40 *Id*. at 24.

Conversely, in *Spate*, the ALJ determined that the presumption was applicable to administrative law proceedings,[41] that Spate's delegated authority contention was an affirmative defense,[42] and that Spate had the burden to prove that the Detroit District Direct was not delegated or re-delegated the authority to issue the Administrator's Determination.[43]

The parties' positions and the ALJs' applications reflect disagreement not only as to how the presumption of regularity operates, but about what it is. *United States v. Chemical Foundation, Inc.*,[44] is often cited for the Supreme Court's statement concerning the presumption: "The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."[45]

Although *Chemical Foundation* is often cited, this case fails to provide insight on the presumption's history, predicates, and most importantly, its application in administrative proceedings. However, *Romero v. Tran*,[46] a United States Court of Appeals for Veterans Claims case, examined the presumption in depth and is illustrative. The *Romero* Court informs us that the presumption of regularity is rooted in English common law and derives from a much broader, more widely applicable principle that "the presumption, that every man has conformed to the law, shall stand till something shall appear to shake that presumption."[47]

In *President of the Bank of U.S. v. Dandridge*, the Supreme Court restated this principle, but also expanded it by stating:

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41 Spate D. & O. at 21-23.

42 *Id*. at 22-23.

43 *Id*. at 23.

44 *United States v. Chem. Found., Inc.*, 272 U.S. 1 (1926).

45 *Id*. at 14-15.

46 *Romero v. Tran*, No. 19-3687, 2021 WL 266399 (Ct. Vet. App. Jan. 25, 2021).

47 *Romero*, 2021 WL 266399, at *3 (quoting *The King v. Hawkins*, 103 E.R. 755, 757-58 (1808)).

> It presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according the maxim, omnia presumuntur rite et solemnitur esse acta, donec probetur in contrarium.[48] Thus, it will presume that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer. . .[49]

While the *Romero* Court recognized that the presumption has been employed in various ways since *Dandridge*,[50] it focused on earlier caselaw and adopted the presumption as a "general working principle" or "a collection of deference doctrines" rather than a rule of evidence. The differences among these variances matter when a court considers what predicate triggers the presumption; typically, an evidentiary presumption applies only upon a showing of predicate evidence while the "presumption of regularity" can be triggered by either evidence or law. For example, in *R.H. Stearns Co. v. United States*, the Supreme Court held that "[a]cts done by a public officer 'which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter.'"[51] Similarly, other courts have also recognized that the presumption may be "premised upon independent legal

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[48] The maxim means "[a]ll things are presumed to have been done rightly and with due formality unless it is proved to the contrary." Carissa Byrne Hessick, *A Bit of History on the Presumption of Regularity*, PRAWFSBLAWG (Jan. 14, 2019, 7:06 AM), https://prawfsblawg.blogs.com/prawfsblawg/2019/01/a-bit-of-history-on-the-presumption-of-regularity.html (exploring the origins of the presumption in U.S. caselaw).

[49] *Dandridge*, 25 U.S. at 69-70.

[50] *Romero*, 2021 WL 266399, at *4, nn. 50-52, (comparing *Dandridge* in which recognizes the presumption of regularity as conceptually distinct from typical evidentiary presumptions, to *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004), in which recognizes the presumption as an "evidentiary presumption," and to Alan Z. Rozenshtein, *Another Blow to the Presumption of Regularity*, LAWFARE (Mar. 10, 2020, 1:47 PM), https://www.lawfareblog.com/another-blow-presumption-regularity, in which recognizes the presumption as a "deference doctrine").

[51] *R.H. Stearns Co. v. United States*, 291 U.S. 54, 62-63 (1934) (presuming that IRS Commissioner was authorized to credit tax overassessment).

authority rather than on evidentiary findings."[52] As a result, if the law imposes a relevant, official duty on an official, we presume that the official has been properly appointed to that position and performed that duty, unless there is evidence to the contrary.

While Respondents claim that the presumption runs afoul of the APA[53] and ARB caselaw, we disagree. The APA provides in relevant part that "except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."[54] Respondents suggest that that this language designates the Administrator as the proponent of the order and places the burden of proof on the Administrator for all issues, including proving that the District Director was properly vested with the authority to issue the Administrator's Determination.[55] Respondents also cite to *Santiglia v. Sun Microsystems, Inc.*, in which the ARB upheld an ALJ's decision that the prosecuting party has the burden of proving each allegation about the respondent's unlawful conduct.[56] However, as the ALJ in *Spate* addressed, and the Administrator correctly points out, "*Santiglia* does not hold that the burden is on the prosecuting party as to all issues. Instead, this case confirms that the prosecuting party has the burden of proving each element in the [substantive underlying] claim."[57]

Respondents also cite to *Director v. Greenwich Collieries*,[58] in which the Supreme Court placed the burden of proof on the claimant because he was the

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[52] *Romero*, 2021 WL 266399, at *5 (quoting *Kyhn v. Shinseki*, 716 F.3d 572, 577 (Fed. Cir. 2013)).

[53] Broadgate Response at 5; Spate's Reply at 5.

[54] 5 U.S.C. § 556(d).

[55] Broadgate Response at 5; Spate Reply at 5.

[56] *Id*. (citing *Santiglia v. Sun Microsystems, Inc.*, ARB No. 2003-0076, ALJ No. 2003-LCA-00002 (ARB July 29, 2005)).

[57] Spate D. & O. at 21 (citing *Santiglia*, ARB No. 2003-0076, ALJ No. 2003-LCA-00002, slip op. at 5-6.)

[58] Broadgate Response at 5; Spate Reply at 5 (citing *Director v. Greenwich Collieries*, 512 U.S. 267 (1994)).

proponent of the order and overturned the "true-doubt rule"[59] because it conflicted with the APA.[60] Respondents assert that the *Greenwich Collieries* holding prohibits the Administrator from using a judicially created presumption to carry her burden of proof.

*Greenwich Collieries* is distinguishable from the present cases because the "true-doubt rule" shifted the burden of persuasion from the claimant seeking benefits to the party opposing benefits compared to the presumption of regularity where the burden of persuasion remained with the Administrator to prove each element in the enforcement action against a respondent. As the Administrator notes, "if, subsequent to application of the presumption to the parties' authority dispute, the Administrator only produced evidence equal in weight to the evidence produced by [Respondents] with respect to the alleged notice violations, the Administrator" would not prevail under *Greenwich Collieries*.[61] In both cases, the Administrator retained complete responsibility to prove by a preponderance of the evidence that Respondents violated the INA, whether the respective ALJ applied or did not apply the presumption. Since the resolution as to whether the Detroit District Director was delegated or re-delegated the authority to issue the Administrator's Determination does not affect the Administrator's obligation to prove the underlying substantive claims, the APA and the holdings in *Santiglia* and *Greenwich Collieries* do not preclude the presumption's application in administrative proceedings.

### 3. The ALJ in *Broadgate* erred in not applying the presumption of regularity and the ALJ in *Spate* correctly applied the presumption

We hold as a matter of law that the presumption of regularity applied to both cases. The ALJ in *Broadgate* did not apply the presumption and instead relied upon

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[59] The true-doubt rule was a presumption which called for an award of benefits to claimants when the evidence was evenly balanced in Black Lung Benefits Act cases.

[60] *Greenwich Collieries*, 512 U.S. at 271, 80-81.

[61] Administrator's Reply Brief (Administrator's Broadgate Reply) at 5.

*American Vanguard*.[62] In *American Vanguard*, the District Court for the District of Columbia was asked to reverse an enforcement order issued by a subordinate official of the United States Environmental Protection Agency (EPA).[63] The enforcement order prohibited a company from selling an already-manufactured pesticide, and required the company to destroy all existing stock of the material.[64] The court held that the subordinate official at the EPA was not delegated or re-delegated the authority to issue the administrative orders to the manufacturer because the record did not establish that the subordinate official at the EPA was authorized to act.[65]

Although *American Vanguard* is relevant within delegation of authority cases, *American Vanguard* is distinguishable from the cases at hand. In *American Vanguard*, the challenging party to the enforcement order introduced an August 1994 internal EPA memorandum in which the EPA Administrator explicitly delegated the authority to issue these orders to the Director of the Toxics and Pesticides Enforcement Division.[66] However, the subordinate official who issued the administrative order was the Director of a different division, the Waste and Chemical Enforcement Division (W & C Division).[67] The *American Vanguard* Court concluded that while there had been overlap between the two divisions prior to a merger, authority to issue the administrative orders had not been transferred to the Director of the W & C, and that the primary enforcement authority rested with the T & P Division since the August 1994 internal memoranda remained valid.[68]

In contrast to *American Vanguard*, there is no internal memorandum delegating the H-1B enforcement authority to a different agency within the DOL in

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62 Broadgate D. & O. at 19; *American Vanguard Co. v. Jackson*, 803 F.Supp.2d 8 (D.D.C. 2011).

63 *American Vanguard*, 803 F.Supp.2d at 11.

64 *Id*. at 10.

65 *Id*. at 14.

66 *Id*. at 12.

67 *Id*. at 10.

68 *Id*. at 14-15.

*Broadgate*. Rather, the H-1B enforcement authority was explicitly delegated from the Secretary to the Administrator and then, the alleged delegation or re-delegation occurred within the same internal agency—the WHD.[69] The distinction between a subdelegation (or re-delegation) in-house to subordinates and delegations to outside entities is paramount. The caselaw reflects that courts permit subdelegations to subordinates, even where the enabling statute is silent, so long as the enabling statute and its legislative history do not indicate otherwise.[70]

Conversely, Spate avers that if the presumption of regularity applied to its case, the ALJ misapplied the presumption. In doing so, Spate does not allege that the Detroit District Director acted improperly in the performance of her duties or that she failed to properly carry out her official duties, but rather, that only the Administrator is empowered to issue the Administrator's Determination and that the Detroit District Director exceeded her authority. In support of its argument, Spate cites to *Flav-O-Rich*.[71] In *Flav-O-Rich*, the Sixth Circuit reviewed two orders from the National Labor Relations Board (NLRB) where the NLRB's chief counsel issued the orders instead of the Board members.[72] The *Flav-O-Rich* Court found that the general counsel's orders were invalid because there was no indication that anyone with the actual authority to decide the case personally considered and

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[69] *See* Secretary's Order No. 01-2014, 79 Fed. Reg. 77,527 (December 24, 2014); see also 20 C.F.R. Part 655.

[70] *See Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1190 (10th Cir. 2014) (citing *Fleming v. Mohawk Wrecking & Lumber Co*., 331 U.S. 111 (1947)); *La. Forestry Ass'n, Inc. v. Sec'y U.S. Dep't of Labor*, 745 F.3d 653, 671 (3d Cir.2014); see also *Frankl v. HTH Corp.*, 650 F.3d 1334, 1350 (9th Cir.2011) (noting the "general presumption that delegations to subordinates are permissible in cases of statutory silence"); *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004), cert. denied, 543 U.S. 925 (2004) (stating "[w]hen a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent."); *United States v. Mango*, 199 F.3d 85, 91–92 (2d Cir.1999); *House v. Southern Stevedoring Co.*, 703 F.2d 87, 88 (4th Cir.1983); *United States v. Gordon*, 580 F.2d 827, 840 n. 6 (5th Cir.1978); *United States v. Vivian*, 224 F.2d 53, 55–56 (7th Cir.1955) (in dicta).

[71] Spate Br. at 8 (citing *Flav-O-Rich, Inc. v. NLRB*, 531 F.2d 358 (6th Cir. 1976)).

[72] *Flav-O-Rich*, 531 F.2d at 363.

decided the issues raised in the petitioner's motion.[73] In doing so, the Court relied upon a similar case, *KFC Nat'l Mgmt Corp. v. NLRB*, in which the Second Circuit held that "general proxies issued by the Board members to those not legally responsible for the review of representation decisions were invalid" because the Board's statutory basis and its own regulations provide for Board review of the Regional Director's decision.[74]

There are two distinct differences between the general counsel's orders in *Flav-O-Rich* and the Detroit District Director issuing the Administrator's Determinations in the present cases. First, the statutory basis for H-1B enforcement is silent regarding delegations or re-delegations of authority in this area, and more importantly, Secretary's Order No. 01-2014 specifically permits re-delegation for this authority.[75]

Second, the Administrator's Determinations in these cases are not the product of the administrative hearing process, but rather they are a product of investigations into employers' compliance with representations made on LCAs.[76] Since they are only a product of investigations, the Administrator's Determinations are not final agency actions that one would reasonably expect to fall under 29 C.F.R. § 2.8's requirements. As we have seen in these cases alone, an Administrator's Determination is only the first-step to a final agency decision. Along the way, the parties are afforded various opportunities for appeal. These include, but are not limited to, a party appealing the Administrator's Determination to the OALJ,[77] one or both parties appealing the OALJ's decision to the ARB,[78] or one or both parties petitioning for referral of an ARB decision directly to the

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[73] *Id*. at 363-64.

[74] *Id*. at 363 (quoting and citing *KFC Nat'l Mgmt Corp. v. NLRB,* 497 F.2d 298, 306 (2d Cir. 1974)).

[75] *See* Secretary's Order No. 01-2014, paragraph 7, "Redelegation of Authority."

[76] *Compare* 20 C.F.R. §§ 655.805(a) through 655.815, *with* 29 C.F.R. §§102.45 through 102.50.

[77] 20 C.F.R. § 655.820.

[78] 20 C.F.R. § 655.845.

Secretary.[79] "If every government action had to be supported with reams of documentation as to its scrupulousness, or if the government had to follow every jot or tittle of the law, governing would grind to a halt."[80]

Therefore, we do not find that *American Vanguard* or *Flav-O-Rich* are applicable to either case. Instead, since both cases concern an individual acting on behalf of the DOL, in performance of a legal duty, we presume that that individual was both properly appointed and acted in accordance with the statutory and regulatory requirements. Thus, as the ALJ in *Spate* did, the ALJ in *Broadgate* should have presumed that the Detroit District Director was delegated or re-delegated the authority to issue the Administrator's Determination unless there was clear evidence to support the contrary.

### 4. Broadgate and Spate did not rebut the presumption of regularity; therefore, the Detroit District Director was presumed to have been delegated or re-delegated the authority to issue the Administrator's Determinations

Whether clear evidence exists to rebut the presumption is a question of law that the Board considers de novo.[81] The inquiry here is whether Respondents produced clear evidence sufficient to persuade us that we should not presume that the Detroit District Director was delegated or re-delegated the authority to issue the Administrator's Determinations (and instead should require the Administrator to prove that the Detroit District Director was delegated or re-delegated the authority).

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79 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

80 *Romero*, 2021 WL 266399, at *4 (quoting Rozenshtein, *supra* note 49).

81 *Romero*, 2021 WL 266399, at *9 (citing *Crumlich v. Wilkie*, 31 Vet. App. 194, 205 (Ct. Vet. App. June 6, 2019); *Lubary*, ARB No. 2010-0137 (holding the Board has plenary power to review ALJ's legal conclusions de novo).

While Respondents concede that there does not appear to be any regulation which specifies the particular manner by which the Administrator may be required to delegate her enforcement power, they also focus on the fact that the Detroit District Director was not explicitly delegated or re-delegated authority in Secretary's Order No. 01-2014, or another subsequent order or a memorandum from the Administrator.[82] Respondents' contention that the Detroit District Director was not explicitly delegated or re-delegated the authority via a statute, regulation, order, or delegation memorandum standing alone is not enough to rebut the presumption.[83] In both cases, neither Broadgate nor Spate presented any evidence, let alone clear evidence, to the effect that the Detroit District Director was not delegated or re-delegated the authority to issue the Administrator's Determinations.

Since Respondents have not rebutted the presumption of regularity, we presume that the Detroit District Director was delegated or re-delegated the authority to issue the Administrator's Determinations. Thus, we reverse, in part, the Broadgate D. & O., and we affirm the Spate D. & O.[84]

### 5. The Board remands *Broadgate* to the ALJ to analyze the remedies ordered by the Administrator's Determination for Violation #2

Having determined that the ALJ in *Broadgate* should have presumed that the Detroit District Director was delegated or re-delegated the authority to issue

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[82] Spate's Br. at 5.

[83] *See Sthele v. Principi*, 19 Vet.App. 11, 17 (Ct. Vet. App. Nov. 20, 2020) (recognizing that "a mere statement of nonreceipt is insufficient to rebut the presumption of regularity"); *see also Harriss v. Comm'r of Internal Revenue*, Nos. 23017-17 and 5690-18, 2021 WL 928663 (U.S. T.C. Mar. 11, 2021) (holding that a petitioner relying upon no evidence except for the fact that a subordinate's position was not expressly listed among a statute, regulation, or delegation order was insufficient to rebut the presumption of regularity).

[84] As we are affirming the ALJ's determination that the Detroit District Director was presumed to have the authority to issue the Administrator's Determination because Spate presented no evidence to rebut the presumption of regularity, we make no determinations on the ALJ's analysis as to whether Spate's authority challenge was an affirmative defense. Spate D. &. O. at 21-23.

the Administrator's Determination, the Board now turns the Administrator's Determination, Violation #2. According to the ALJ in *Broadgate*, the sole issue on appeal was whether Broadgate willfully and substantially failed to provide notice of the filing of LCAs in violation of 20 C.F.R. § 655.734.[85] However, upon review of the record, the Board recognizes that the ALJ did not analyze Broadgate's request to review the civil money penalties (CMPs) assessed and the debarment imposed by the Administrator's Determination.[86] Violation #2 assessed a CMP in the amount of $66,176.00 and debarred Broadgate from the DOL's permanent and temporary labor certification programs for at least two years.[87] Finding that the Detroit District Director was not delegated or re-delegated the authority to issue the Administrator's Determination, the ALJ did not review the remedies ordered by the Administrator's Determination for Violation #2. As such, remand is necessary to allow the ALJ to make findings of fact and law as to the number of violations incurred by Broadgate, if any, the nature and severity of any violation(s), the amount of CMPs assessed for such violation(s), and any other remedies applicable to the violation(s), including debarment.[88]

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[85] Broadgate D. & O. at 4-5.

[86] Broadgate's Request for Hearing on Administrator's Determination before the OALJ, dated January 15, 2019, also requested a hearing on the following issues, applicable to Violation #2: "[w]hether civil money penalties were appropriately assessed in this matter;" "[w]hether the Administrator abused his discretion in assessing civil monetary penalties and/or setting the amount of such penalties;" "[w]hether the [DOL's] Employment and Training Administration (ETA) and the Department of Homeland Security (DHS) should be notified of the occurrence of any such violation(s);" "[w]hether the Administrator abused his discretion in determining that the [ETA] and the [DHS] will be notified of the occurrence of any such violation(s);" and "[w]hether upon receipt of such notification, ETA will be required to invalidate any pending LCA(s) and not accept for filing any applications or attestations submitted under the Department's permanent or temporary labor certification[.]"

[87] Broadgate JX 16.

[88] 20 C.F.R. § 655.840.

## CONCLUSION

In sum, the presumption of regularity was created to promote administrative efficiency and the separation of powers.[89] Therefore, we hold if the law imposes an official duty on an official, we presume that the official has been properly appointed to that position and performed that duty, unless there is evidence to the contrary. We have concluded that this presumption applied in the two instant cases and that it was not rebutted due to the fact no evidence was proffered to the contrary.

However, while long-standing caselaw affords agencies which claim a proper delegation a presumption of regularity (essentially a presumption of legality) when officials delegate authority to lower level officials to exercise certain powers, we caution that that presumption should not be perceived as a shield behind which haphazard or ill-defined delegations may occur. The power of government, even at lower levels, can be immense in terms of impact on the regulated community. Therefore, to whom that power is delegated should be prudently considered, tracked, and documented in some manner. This is important so that all parties, both within and outside of government, understand who has delegated authority, and who is responsible and accountable for exercising it reasonably. This can prove an administrative burden, but it remains as a critical procedural requirement even as other substantive matters demand the day to day attention of senior officials.

Upon consideration of the parties' briefs on appeal, and having reviewed the evidentiary record as a whole, we conclude that the Detroit District Director was presumed to have been delegated or re-delegated the authority to issue the Administrator's Determinations. We reverse, in part, and remand, in part, the Broadgate D. & O., and affirm the Spate D. & O.

**SO ORDERED.**

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89 *See United States v. Nix*, 189 U.S. 199, 206 (1903); *Parks v. Shineski*, 716 F.3d 581 (Fed. Cir. 2013).