In the Matter of:

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

COMPLAINANT,

v.

BEVERLY ENTERPRISES, INC., BEVERLY HEALTH AND REHABILITATION SERVICES, INC.,

RESPONDENTS.

ARB CASE NO. 99-050

(ALJ CASE NO. 98-ARN-3)

DATE: July 31, 2002

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Jonathan M. Kronheim, Esq., Steven J. Mandel, Esq., Eugene Scalia, Esq., *U.S. Department of Labor, Washington, D.C.*

For the Respondents:
Julie M. Carpenter, Esq., *Jenner & Block, Washington, D.C.*
Hugh Reilly, Esq., *Beverly Enterprises, Inc., Fort Smith, Arkansas*

DECISION AND ORDER OF REMAND

This case arises under the Immigration Nursing Relief Act of 1989 (INRA or the Act), 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(a) and 1182(m) (West 1999), and raises significant questions as to the basis and scope of the Department of Labor's authority to investigate possible violations of the INRA's attestation requirements. We reverse the decision of the Administrative Law Judge (ALJ) and hold that, under a Department of Labor regulation implementing the INRA, the Administrator of the Wage and Hour Division (Administrator) has the authority to conduct so called "directed investigations" without a complaint from an aggrieved party. We also hold that a State Department telegram transmitted to the Wage and Hour Division constituted a "complaint" from an "aggrieved

party" about a "facility" within the meaning of the Act and that, whether the investigation was directed by the Administrator or was initiated by a complaint, the Administrator was not time barred from completing the investigation or initiating this proceeding. For these reasons, we remand this case for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL HISTORY

Respondent Beverly Enterprises, Inc. operates a network of over 700 health care and nursing facilities in the United States and employs about 70,000 health care professionals and other staff at rehabilitation centers, acute care hospitals, assisted living centers, and other facilities. Respondent's Motion for Summary Judgment on the Threshold Issues before the ALJ, at 1.

In January 1995 the Wage and Hour Division, U. S. Department of Labor, received a telegram from a Department of State official in the Philippines. See Joint Stipulation of Facts at attachment 1. The telegram asserted that the Philippines is home to "the world's largest visa fraud post." *Id.* at ¶ 4. The official asserted that U.S. "petitioners" of registered nurses might be acting unlawfully in their recruitment of foreign nurses under the INRA, and that an investigation was warranted. *Id.* at ¶ 8. The State Department official estimated that more than fifty per cent of these visa recipients ultimately did not work as nurses in the United States, and that if they fail the state nursing examination, which many of them do, they "are farmed out by their petitioners [such as Beverly] as licensed practical nurses (LPN) or as nursing aides." *Id.* at ¶ 2. The State Department telegram detailed specific charges against Beverly. "Beverly Enterprises . . . which successfully petitioned 418 Filipino nurses in the past 24 months states in its standard employment agreement" that the nurse will receive less than the prevailing wage for nurses until licensure is obtained. The telegram further quoted Beverly's agreement as stating "if [licensure is] not successfully achieved, the foreign nurse will be retained by Beverly enterprises of California in the capacity of a nursing assistant at the rate of approximately . . . [$]6.00 per hour." *Id.* at 8. These charges alleged violations not at just one facility but at all of Beverly's facilities in California.

The telegram goes on to allege a violation by a specific subsidiary of Beverly:

> In a letter to the embassy dated April 15, 1994 the Nurses Exchange of America (the Exchange), a Beverly subsidiary, complains about the denial of an H1A visa to one of its beneficiaries whose papers explicitly stated that she would be retained as a nursing assistant if she failed the state board exam. The Exchange argument was that it is a de facto situation that most H1A nurses in the U.S. who fail the initial RN exam are either retained as nursing assistants or LVNS/LPNS (if they have also taken this exam) provided their H1A visa is still valid. The employing petitioners are aware that only about 40 per cent of the foreign-trained nurses would pass the RN exam in the first sitting.

State Department telegram, at ¶ 11.

In April 1995 Wage and Hour notified Beverly that it intended to investigate. As of May 1996, Beverly was refusing to provide documents and information requested because it contested the Wage and Hour Administrator's jurisdiction. On March 13, 1998, the Administrator issued a determination that a basis existed for finding Beverly in violation of the INRA. The Administrator seeks payment of approximately $3,200,000 in back wages and $1,000,000 in civil money penalties. Beverly requested a hearing, and both parties filed motions for summary judgment. In a decision of February 4, 1999, the ALJ granted Beverly's motion and reversed the Administrator's determination, holding that under the "clear and unambiguous language of the statute, the Administrator did not have the authority to conduct a directed investigation." The ALJ also concluded that, because the State Department telegram was not filed by an "aggrieved party" as required by the Act, it therefore did not constitute a "complaint" upon which an investigation could be predicated. Finally, he ruled that because the Administrator's determination occurred beyond the statutory 180-day time period, and that Beverly was thereby prejudiced, the determination was time barred. Recommended Decision and Order (R. D. & O.) at 6, 8, 11. The Administrator petitioned the Administrative Review Board (Board or ARB) for review of the ALJ's decision.

The Administrator argues before the Board that under 20 C.F.R. § 655.400(b)(2001), which states in pertinent part,"[t]he Administrator, *either* pursuant to a complaint *or otherwise,* shall conduct such investigations as may be appropriate" (emphasis added), she has authority to conduct investigations without first receiving a complaint from an aggrieved person or organization. Furthermore, she asserts, the Board should defer to the Administrator's interpretation of the Act, which is supported by the structure of the INRA itself and its legislative history.

The Administrator also urges that the State Department is an "aggrieved party" under 8 U.S.C.A. § 1182(m)(2)(E)(ii), and thus has the authority to file a complaint. The Administrator has routinely initiated investigations on the basis of information provided by the State Department, which, she contends, demonstrates her authority to interpret broadly the "aggrieved party" provision and is, therefore, entitled to deference by the ARB. As an agency administering closely related provisions of the Immigration and Nationality Act, the State Department, according to the Administrator, plays an important role in enforcing the statute. She argues that if the Department of Labor could not initiate investigations on the basis of information provided by the State Department, such preclusion would have a significant impact upon the immigrant nurse program.

Finally, the Administrator contends that the failure of Wage and Hour to meet the 180-day time limit specified in the Act does not deprive the Department of Labor of jurisdiction. She maintains that this question is directly controlled by the Supreme Court's decision in *Brock v. Pierce County,* 476 U.S. 253 (1986).

Respondent Beverly, on the other hand, argues that the language of the statute explicitly restricts the Department of Labor to investigations based on valid complaints. Information provided by another government agency such as the State Department does not constitute a complaint under the Act, Beverly says, because the State Department is not an "aggrieved party" within the meaning of the Act. Finally, Beverly argues that this proceeding is equitably and statutorily time barred.

JURISDICTION AND SCOPE OF REVIEW

We have jurisdiction of the Administrator's petition for review under 20 C.F.R. § 655.445(a) (2001).[1] This Board has authority to review the ALJ's factual and legal conclusions *de novo*. 5 U.S.C.A. § 557(b)(West 1996). *See also Whitaker v. CTI-Alaska, Inc.*, ARB No. 98-036, ALJ No. 97-CAA-15, slip op. at 3 n.4 (May 28, 1999) (ARB's authority to review summary judgment recommendations *de novo*).

ISSUES PRESENTED

We address the following issues:

1. Whether Department of Labor regulations implementing the INRA provide the Administrator the authority to conduct "directed investigations," that is, investigations initiated without a complaint by an aggrieved party.

2. Whether the State Department telegram constituted a "complaint" by an "aggrieved party" about a "facility" within the meaning of the statute.

3. Whether the INRA requirement that the Administrator shall file a determination within 180 days of receiving a complaint bars her from prosecuting this case.

DISCUSSION

I. Authority to Direct Investigations

Our review of Congressional intent in enacting the INRA, the terms of the Act, and the Secretary of Labor's implementing regulations leads us to conclude that the Administrator has properly asserted her authority to direct investigations whether or not initiated by a "complaint" of an "aggrieved party."

We are mindful that, in H-1A enforcement cases,[2] the role of the ALJ is explicitly circumscribed by a Department of Labor regulation implementing the INRA, which provides, in Subpart E, that "[t]he administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision . . .." 20 C.F.R. § 655.440(b). *See also Stouffer Foods Corp. v. Dole*, No. 7:89-2199-3, 1990 WL 58502, at * 1 (D.S.C. Jan. 23, 1990) ("Defendant's [Department of Labor's] administrative law judges are bound by Executive Order 11246 and its implementing regulations; they have no jurisdiction to pass on their validity.").

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[1] Although this section of the regulations still refers to review by the Secretary of Labor and requires documents to be filed with the former Office of Administrative Appeals, Secretary's Order No. 2-96 delegated authority to the Board to act for the Secretary on petitions for review under the INRA. Secretary's Order No. 2-96, § 4c (20); 61 Fed. Reg. 19978 (May 3, 1996).

[2] 8 U.S.C.A. § 1101(a)(15)(H)(i)(a). The last three subparts of this citation have given the immigrant nurse program its "H-1A" moniker.

Likewise, this "Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations which has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions." Secretary's Order No. 2-96, § 4c(20); 61 Fed. Reg. 19979 (May 3, 1996). Accordingly, we do not pass on the validity of the Secretary's implementing regulations in the process of interpreting their meaning as applied to the facts of this case.

To evaluate the Administrator's position that the "or otherwise" regulation permits investigations without a complaint, we do not examine the regulation's language in isolation. Rather, we consider the context in which it was promulgated, notably the statute from which it draws its authority, and the statute's legislative history. In so doing, we

> exhaust the traditional tools of statutory construction . . . and may examine the statute's legislative history in order to shed new light on congressional intent, notwithstanding statutory language that appears superficially clear . . . and must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy making decision . . . to an administrative agency.

National Rifle Assoc. of America, Inc. v. Reno, 216 F.3d 122, 127 (D.C. Cir. 2000) (citations omitted).

Because of a nationwide shortage of registered nurses, Congress enacted the INRA in 1989 and sought to regulate the admission of foreign registered nurses to the United States. H. Rep. No. 101-288, 101st Cong., 1st Sess. (1989), *reprinted in* 1989 U.S.C.C.A.N. 1894, 1895. In addressing the nursing shortage and ensuring that the importation of nurses did not adversely affect the labor market, the Act provided for "stricter procedures for future admissions of nurses [with a] penalty structure [that] contemplates maximum flexibility for the admission of aliens . . . and severe penalties for those who fail to meet the terms of the attestation." *Id*. at 1898.

The legislative history of the statute makes it plain that Congress intended the Department of Labor to conduct directed investigations in situations in which there was credible evidence the Act was being violated, but had not received a complaint from a particular aggrieved party. The Chairman of the House subcommittee that considered the bill, Representative Morrison, gave a lengthy explanation of the bill when it was under consideration for passage in the House of Representatives. Representative Morrison explained the enforcement provisions of the bill, saying "[a]lthough the admission requirements are streamlined, the bill provides very structured penalties on employers who make misrepresentations on the attestation or fail to comply with the conditions. Any aggrieved nurse may file a complaint with the Secretary of Labor, *and the Secretary can initiate investigations on its* [sic] *own.*" 135 Cong. Rec. H7092-01, H7095 (Oct. 17, 1989) (emphasis added).

The House Judiciary Committee report on the bill that became the INRA states that "[i]nvestigations may be initiated in two instances: (1) *through the Secretary of Labor when there is reasonable cause to believe a facility fails to meet conditions of the attestation*, and (2) upon the filing of a complaint by an aggrieved party." 1989 U.S.C.C.A.N. at 1900 (emphasis added).

Elsewhere in the report, the Committee, in describing the purpose of requiring two notices of the filing of an attestation said "[t]he Committee expects both notices to be provided in a timely fashion so that aggrieved parties *or the Department of Labor* can take appropriate action if terms of the attestation have not been adhered to." *Id.* at 1899 (emphasis added).

This legislative history, in effect, spoke to precisely the situation giving rise to this case. That is, Congress expected the Secretary to take action to implement the "severe penalty" provisions of the Act when she receives a detailed statement of alleged violations from a highly credible source such as the State Department, which had concluded that "the H1A program is being used as a vehicle for large-scale immigration fraud." Department of State telegram, Section 15, ¶ 1; Joint Stipulation of Facts, at attachment 1.

Under the provisions of the Act, to qualify for admission to the United States, the alien must have "passed an appropriate examination . . . or [have] a full and unrestricted license under State law to practice professional nursing in the State of intended employment . . .[,]" 8 U.S.C.A. § 1182(m)(1)(B), and must be "fully qualified and eligible under the laws . . . governing the place of intended employment to engage in the practice of professional nursing as a registered nurse immediately upon admission to the United States." 8 U.S.C.A. § 1182(m)(1)(C). Any facility seeking to employ the foreign registered nurses must file an attestation with the Secretary of Labor that, among other things, the alien nurses will be paid the same wages as the registered nurses already employed there. 8 U.S.C.A. § 1182(m)(2)(A)(iii).

In order to process and investigate any charges that a facility has not met the conditions or misrepresented facts contained in its attestation, the INRA requires the Secretary to establish certain procedures:

> (ii) The Secretary of Labor shall establish a process, including reasonable time limits, for the receipt, investigation, and disposition of complaints respecting a facility's failure to meet conditions attested to or a facility's misrepresentation of a material fact in an attestation. Complaints may be filed by any aggrieved person or organization (including bargaining representatives, associations deemed appropriate by the Secretary, and other aggrieved parties as determined under regulations of the Secretary). The Secretary shall conduct an investigation under this clause if there is reasonable cause to believe that a facility fails to meet conditions attested to. Subject to the time limits established under this clause, this subparagraph shall apply regardless of whether an attestation is expired or unexpired at the time a complaint is filed.

8 U.S.C.A. § 1182(m)(2)(E)(ii).

The Secretary is to make a determination, within 180 days after the complaint is filed, whether a basis exists to make a finding that there was a misrepresentation of material fact or failure to meet a condition in the attestation:

> (iii) Under such process, the Secretary shall provide, within 180 days after the date such a complaint is filed, for a determination as to whether or not a basis exists to make a finding described in clause (iv). If the Secretary determines that such a basis exists, the Secretary shall provide for notice of such determination to the interested parties and an opportunity for a hearing on the complaint within 60 days of the date of the determination.

8 U.S.C.A. § 1182(m)(2)(E)(iii).

If the Secretary finds, after notice and opportunity for a hearing, that the facility has failed to meet a condition attested to or that there was a misrepresentation of material fact in the attestation, she may impose administrative remedies, including civil money penalties:

> (iv) If the Secretary of Labor finds, after notice and opportunity for a hearing, that a facility (for which an attestation is made) has failed to meet a condition attested to or that there was a misrepresentation of material fact in the attestation, the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per nurse per violation, with the total penalty not to exceed $10,000 per violation) as the Secretary determines to be appropriate. Upon receipt of such notice, the Attorney General shall not approve petitions filed with respect to a facility during a period of at least one year for nurses to be employed by the facility.

8 U.S.C.A. § 1182(m)(2)(E)(iv).

The Act also provides that the Secretary shall order the facility to provide for payment of such amounts of back pay as may be required to comply with the facility wage rate requirement of the attestation:

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

8 U.S.C.A. § 1182(m)(2)(E)(v).

The above-quoted language of the Act does not clearly and explicitly restrict the Secretary to investigations based only on valid complaints. Contrary to the ALJ's finding and Respondent Beverly's contention, the statute offers several possible interpretations. For instance, subsection (iv)

can be read as authorizing the Administrator to make findings independent of the complaint process set out in subsection (ii) of § 1182(m)(2)(e). Unlike subsection (iii), which clearly references the complaint process and is thereby restricted by that process, (iv) contains no such limiting language.

An alternative interpretation of the Administrator's authority to investigate and determine violations may be found in the third sentence of subsection (ii). This language can be read to require the Administrator to conduct investigations, apart from the complaint process, "if there is reasonable cause to believe that a facility fails to meet conditions attested to." 8 U.S.C.A. § 1182(m)(2)(E)(ii).

The Board believes that the intent of Congress with regard to the Secretary's authority has been carried out in the Department of Labor's rulemaking. Congress explicitly granted rulemaking authority to the Secretary under the INRA. Section 3(c)(1) of the INRA directed the Secretary to publish regulations to carry out the purpose of the Act:

> The Secretary of Labor (in consultation with the Secretary of Health and Human Services) shall (1) first publish final regulations to carry out section 212(m) [8 U.S.C.A. § 1182(m)] of the Immigration and Nationality Act (as added by this section) not later than the first day of the 8th month beginning after the date of the enactment of this Act . . ..

Pub. L. 101-238, 8 U.S.C.A. § 1182(m) note.

Those implementing regulations delegate all of the Secretary's investigative and enforcement functions to the Administrator. 20 C.F.R. § 655.400(a). Furthermore, giving effect to the legislative intent that "investigations may be initiated . . . through the Secretary of Labor when there is reasonable cause to believe a facility fails to meet conditions of the attestation, [or] . . . upon the filing of a complaint by an aggrieved party," 1989 U.S.C.C.A.N. at 1900, the implementing regulations provide:

> The Administrator, *either* pursuant to a complaint *or otherwise*, shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and gather such information as deemed necessary by the Administrator to determine compliance regarding the matters to which a health care facility has attested under section 212(m) of the INA (8 U.S.C. § 1182(m)) and subparts D and E of this part.

20 C.F.R. § 655.400(b) (emphasis added).

Judicial analyses of the scope of agency authority to interpret statutory language guide us in interpreting the "or otherwise" regulation. Where, as here, Congress has not spoken explicitly on a particular question in a statute, or if the statutory language is ambiguous, a court will defer to a reasonable interpretation placed on the language by the agency charged with enforcement of the

statute. As the Supreme Court explained in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*,

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. 837, 842-43 (1984).

In *Mead v. United States,* 533 U.S. 218 (2001), the Court elaborated on *Chevron*:

> [A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

Id. at 226-27.

In arriving at his decision that the Administrator does not have the authority to conduct an investigation without a complaint, the ALJ first interpreted the INRA statute and ruled, in effect, that the complaint by an aggrieved party process is the only authorized method for an investigation. R. D. & O. at 5. The judge conceded the "possibility" of prosecuting the allegations in the absence of a complaint, but then rejected the validity of the Secretary's rule because, he claimed, the statute is unambiguous and "prevails" where there is a conflict between it and a regulation. R. D. & O. at 8. The ALJ seemed to recognize his limited authority to rule on the legality of the regulation and stated that "interpretation . . . can be accomplished . . .without ruling on the validity of the regulations." But the ALJ's conclusion in effect invalidated the regulation or at least gave no meaning to its "or otherwise" language. R. D. & O. at 4, 8. We find this constituted error.

We conclude that by promulgating the regulation stating, "[t]he Administrator, *either* pursuant to a complaint *or otherwise*, shall conduct such investigations as appropriate," (emphasis added), the Secretary unmistakably interpreted the statute consonant with Congress' intent that the Department should act, complaint or not, when a facility is alleged to be violating the terms of its

attestation or to be misrepresenting material facts. Beverly's construction of the statute and regulation would have the U. S. Department of Labor stand idly by, despite having received, as here, serious allegations from a credible source. Such a reading of the statute and regulation is hardly reasonable. Deference is due to the Administrator's interpretation and implementation of the "or otherwise" regulation, since the Administrator is charged with enforcing the Act. An interpretation to the contrary would render the language mere surplussage and would be inconsistent with Congressional intent. For these reasons, we hold that the words "or otherwise" in the regulation authorize "directed investigations," and that the Administrator could initiate the investigation in this case based upon the allegations in the State Department telegram, even if the telegram did not constitute a complaint under the INRA.

II. Complaint by an Aggrieved Party about a Facility

Although we have held that the Administrator had the authority to direct the investigation and seek payments from Respondent Beverly, we also address the ALJ's ruling that the Department of State was not an "aggrieved party." R. D. & O. at 6. We reverse the ALJ and hold that the U. S. Department of Labor's receipt of a telegram from a Department of State official in the Philippines that mentioned Beverly by name constituted a "complaint" by an "aggrieved party" about a "facility."

Under the INRA, "any aggrieved person or organization" may file a "complaint" about a "facility:"

> (ii) The Secretary of Labor shall establish a process, including reasonable time limits, for the receipt, investigation, and disposition of complaints respecting a facility's failure to meet conditions attested to or a facility's misrepresentation of a material fact in an attestation. Complaints may be filed by any aggrieved person or organization (including bargaining representatives, associations deemed appropriate by the Secretary, and other aggrieved parties as determined under regulations of the Secretary).

8 U.S.C.A. § 1182(m)(2)(E)(ii).

A. Complaint

We first address whether the telegram was a "complaint" about a "facility." The Secretary's regulations describe "complaint:"

> No particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint. The complaint shall set forth sufficient facts for the Administrator to determine what part or parts of the attestation or regulation allegedly have been violated.

20 C.F.R. § 655.405(b).

Under the terms of 20 C.F.R. § 655.405(b), the telegram was a "complaint." It asserted that "the H1A [sic] program is being used as a vehicle for large-scale immigration fraud." See Joint Stipulation of Facts at attachment 1, at ¶ 15. The State Department telegram estimated that more than fifty per cent of these visa recipients ultimately did not work as nurses in the United States. *Id.* at ¶ 2. It claimed that many of the H-1A visa recipients fail state licensing exams and are "farmed out" by organizations that petition for their admission to the United States as licensed practical nurses or nursing aides. *Id.* The State Department telegram detailed specific charges against Beverly which, if true, constituted clear violations of the INRA, and its implementing regulations: "Beverly Enterprises . . . which successfully petitioned 418 Filipino nurses in the past 24 months states in its standard employment agreement" that the nurse will receive less than the prevailing wage for nurses until licensure is obtained. The telegram further quoted Beverly's agreement as stating "if [licensure is] not successfully achieved, the foreign nurse will be retained by Beverly Enterprises of California in the capacity of a nursing assistant at the rate of approximately . . . [$]6.00 per hour." *Id.* at ¶ 8. These charges asserted violations not at just one facility but at all of Beverly's facilities in California. The telegram also claimed a possible violation by Beverly's subsidiary, the Nurses Exchange of America, which admitted that "[t]he employing petitioners are aware that only about 40 per cent of the foreign-trained nurses would pass the RN exam in the first sitting." *Id.* at ¶ 11. Therefore, the State Department telegram was a "complaint" since it alleged large-scale immigration fraud and widespread violations of the INRA, and it levied specific charges against Beverly and its subsidiaries of regularly violating the INRA by employing H-1A nurses as nursing assistants and paying less than the wage for registered nurses.

The State Department telegram's recital of facts concerning the amount of payment under Beverly's agreement with the nurses is sufficient for a determination that Beverly and its subsidiaries allegedly violated 20 C.F.R. § 655.310(f) ("The facility employing or seeking to employ the alien shall attest that the alien employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility.").[3] It is also sufficient for a determination that Beverly's attestation on this point was allegedly violated. Moreover, the facts in the telegram concerning the inability of the nurses to qualify for licensure are sufficient to constitute allegations of possible violations of 20 C.F.R. §§ 655.300, 655.302 and 655.310, under which the filing and attestation process is to be used to admit alien nurses who meet the qualifications of the statute and regulations ("In order to qualify under this definition of 'nurse' the alien shall . . . (3) be fully qualified and eligible under the laws . . . governing the place of intended employment to practice as a registered nurse immediately upon admission to the United States . . .." 20 C.F.R. § 655.302). Thus, the telegram set forth sufficient facts for the Administrator to determine what part or parts of the attestation and regulation allegedly had been violated.

[3] The regulations required the facility to pay each nurse the higher of the prevailing wage for the occupation in the geographic area or the facility wage. 20 C.F.R. § 655.310(f). The requirement for payment of the prevailing wage was struck down by the federal district court in *Beverly Enterprises v. Herman*, 119 F. Supp. 2d 1 (D.D.C. 2000). The requirement for payment of the facility wage rate for registered nurses remains unaffected.

B. Facility

The telegram also concerned one or more "facilities:" Beverly Enterprises and the Nurses Exchange, a Beverly subsidiary. Under 20 C.F.R. § 655.302, a "facility" means "a user of nursing services and includes an employer of registered nurses which provides health care services in a home or other setting, such as a hospital, nursing home or other site of employment not owned or operated by the employer (*e.g.*, a visiting nurse association or a nursing contractor)." Beverly Enterprises, Inc. employs about 70,000 health care professionals and other staff at rehabilitation centers, acute care hospitals, and assisted living centers in a network of over 700 health care and nursing facilities that it operates in the United States. Respondent's Motion for Summary Judgment in the Threshold Issues before the ALJ at 1. Beverly and its subsidiary are thus users of nursing services and employers of registered nurses who provide health care services. Additionally, attestations may only be filed by "facilities," and Beverly filed such attestations. Beverly and its subsidiaries are therefore "facilities."

C. Aggrieved Party

Since we are satisfied that the State Department telegram was a "complaint" about "facilities" within the terms of the Act, we turn to whether the Department of State should be considered an "aggrieved person or organization" within the meaning of 8 U.S.C.A. § 1182(m)(2)(E)(ii). Because we hold that it should, we reverse the ALJ.

The INRA does not define "aggrieved person or organization," but it provides examples: "bargaining representatives, associations deemed appropriate by the Secretary, and *other aggrieved parties* . . .. 8 U.S.C.A. § 1182(m)(2)(E)(ii)(emphasis supplied). As used, "aggrieved part[y]" appears to be interchangeable with an "aggrieved person or organization" that may initiate a complaint. The Secretary has not promulgated regulations defining "aggrieved parties" for purposes of the H-1A program. We therefore look outside the statutory and regulatory scheme of the Act for interpretive guidance on the meaning of "aggrieved party" and "aggrieved person or organization."

An administrative agency may admit a party to its proceedings when doing so would assist the agency in carrying out its Congressional mandate for administering the statute under which the proceeding arises. For example, in *Koniag, Inc., Village of Uyak v. Andrus,* 580 F.2d 601 (D.C. Cir. 1978), Department of the Interior regulations provided that any "party aggrieved" could appeal an area director's decision to an ALJ who would then conduct a *de novo* hearing and make a recommended decision to an administrative board. Two sub-agencies, rather than the groups more directly affected, appealed a decision of the area director to the board. The Court of Appeals held that these agencies had standing to file an administrative appeal. The court reviewed Congressional intent, construed "party aggrieved" broadly in the light of that intent, and deferred to the Department of the Interior on who could raise an appeal to the board:

> [T]he term "party aggrieved" must be construed generously to achieve the congressional objective that determinations be careful as well as quick. We conclude, therefore, that grafting strict judicial standing

> requirements onto these regulations would be inconsistent with the act and the Secretary's plan to implement it.

Id. at 606.

Concurring, Judge David Bazelon stated that "administrative standing should be determined in light of the functions of an administrative agency, and whether a would-be participant would contribute to fulfilling those functions." 580 F.2d at 611. Contrasting administrative standing with standing to sue in court, Judge Bazelon wrote that neither the "case or controversy" requirements, nor the "prudential rules" of judicial standing apply to administrative agencies. Specifically with respect to the "zone of interests" test (one of the prudential rules), relied upon by Respondent Beverly, Judge Bazelon said:

> [P]rudential limitations reflect a concern about the limited authority and competence of the judiciary in setting general policy. . .. Administrative agencies, on the other hand, derive their powers from Congress . . .. Although this delegation of power is subject to limitations, an agency has unquestioned authority to set general policies affecting large numbers of people when it acts within the scope of its statutory mandate.

Id. at 613. *See also Gettman v. Drug Enforcement Admin.*, 290 F.3d 430, 433 (D.C. Cir. 2002) (discussing distinction between administrative standing and judicial standing; holding that "[p]etitioners may be 'interested part[ies]' under the statute, and therefore able to petition the agency, and yet not have Article III standing to bring this action in federal court."); *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*, 194 F.3d 72, 74 (D.C. Cir. 1999) ("The criteria for establishing 'administrative standing' . . . [are] less demanding than the criteria for 'judicial standing.'"); *Ingalls Shipbuilding Div. Litton Systems, Inc. v. White*, 681 F.2d 275 (5th Cir. 1982)(discussing administrative standing of Director, OWCP, to intervene in review of a settlement before the Benefits Review Board); *Pennzoil Co. v. F.E.R.C.*, 645 F.2d 360, 391 (5th Cir. 1981) (pipeline customers deemed parties in interest); *Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir.1976) ("The agencies' responsibility for implementation of statutory purposes justifies a wider discretion, in determining what actions to entertain, than is allowed to the courts by either the constitution or the common law."). *Cf., Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) (articulating the requirements for judicial standing). In short, "administrative standing" to appear before or challenge an administrative agency's decisions in the administrative adjudication context is far less rigorous a test than "standing" under the "case or controversy" provisions of the Constitution or the judicially created "prudential considerations" analysis.

Having reviewed "aggrieved party" in terms of standing to participate in administrative proceedings, we return to the question of whether the State Department should be considered an "aggrieved party" or "aggrieved person or organization" for the purpose of initiating an INRA complaint. In *Koniag,* the court of appeals construed Congressional intent broadly to include the right of a federal agency to appear before an agency board as an "aggrieved party." We adopt the *Koniag* approach here. The INRA requires the Secretary of Labor to "establish a process for the receipt, investigation, and disposition of complaints [which] may be filed by any aggrieved person

or organization . . .." 8 U.S.C. A. § 1182(m)(i)(E)(ii). As a Federal agency with responsibility for preventing improper entry into the United States, the State Department alleged large-scale immigration fraud and widespread violations of the INRA. The Administrator, who has been delegated the authority of the Secretary under the INRA, has determined that accepting a complaint from another federal agency such as the State Department would materially assist the Department of Labor in carrying out its enforcement responsibilities as Congress directed. 8 U.S.C.A. § 1182(m)(2)(E). In addition, under the INRA, the State Department is required to determine whether applicants for H-1A visas meet the statutory requirements and must reject applications from any person whom a consular officer "knows or has reason to believe . . . is ineligible to receive a visa." 8 U.S.C.A. § 1201(g). If a petitioner is in violation of the attestations required for admission of nonimmigrant aliens under the INRA, the Attorney General may not approve petitions for the admission of nonimmigrant nurses and the State Department would not be permitted to grant them visas. 8 U.S.C.A. § 1182(m)(2)(E)(iv). The State Department, thus, is like the two sub-agencies in *Koniag,* which were given administrative standing to appeal under the "aggrieved party" language, based on their enforcement mandates. *Koniag*, 580 F.2d at 605, 607.

Under *Koniag,* therefore, permitting the State Department to file a complaint to initiate an investigation, *i.e.*, giving a broad interpretation to the term "aggrieved person or organization," serves the purposes of the INRA of protecting domestic labor markets and assuring proper compensation to alien nurses, as well as preventing ineligible aliens from entering the country. *See Beverly Enterprises, Inc. v. Herman*. 119 F.Supp.2d 1, 12 (D.D.C. 2000). Active participation by the State Department in the investigative process under the INRA clearly contributes to the Department of Labor's fulfillment of its INRA functions. *See Koniag,* 580 F.2d at 611. However, unlike the situation in *Koniag,* we are not reviewing the State Department's right to participate in an agency adjudication. Rather, we view the State Department's role here as merely that of a reliable informant. If, as it does, the case law would permit the State Department to participate as an "aggrieved party" in an agency proceeding, then it is logical to accord the State Department "aggrieved person or organization" status solely for the purpose of initiating a complaint. We reach that decision here and reverse the ALJ's conclusion that denied the State Department "aggrieved party" status.

In ruling that the State Department qualifies as an "aggrieved party," we agree with the Administrator, but on different grounds. The regulations implementing the H-1B program (applying similar requirements to aliens seeking to enter the United States for other occupations, 8 U.S.C.A. § 1101(a)(15)(H)(i)(b)) explicitly provide that the term "aggrieved party" includes a "government agency which has a program that is impacted by the employer's alleged non-compliance with the labor condition application." 20 C.F.R. § 655.715. Because both sections of the Immigration and Nationality Act use the same term, "aggrieved party," to define parties who may file a complaint, because the two sections appear consecutively in the statute, and because "identical words used in different parts of the same act are intended to have the same meaning," the Administrator argues that the definition of "aggrieved person" under the H-1B regulations should "guide" interpretation of that term under the H-1A program. The Administrator suggests that the Board should rule that "aggrieved person" has the same meaning under both sections and that such a ruling, as an adjudicative interpretation by a policy-making agency, would be entitled to deference under *Chevron U.S.*A. *Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Administrator also relies on a decision by another Department of Labor ALJ, in very similar circumstances to these, that

the Administrator may initiate an investigation based on a complaint from the State Department. *See Administrator v. Alden Management Service, Inc.*, ALJ No. 1996-ARN-3, slip op. at 5-6 (ALJ Nov. 3, 1998) ("The Department of Labor, Department of State and the Immigration and Naturalization Service work together to administer the H-1A program. If the Respondent's argument that the telegram [from the State Department] is not an aggrieved person was accepted, it would force each of these agencies in many circumstances to turn a blind eye to alleged violations of law discovered by the other agencies administering the Act.").

The ALJ here declined to accept the Administrator's position, holding that, because the H-1A and H-1B programs were enacted separately, and the Secretary never promulgated regulations defining "aggrieved party" under H-1A, the H-1B regulatory definition of aggrieved party cannot be applied to the H-1A program. R. D. & O. at 6. We do not decide whether the H-1B definition of "aggrieved person" that includes another "government agency" should be imported into H-1A to determine its meaning, since we have held that the State Department qualifies as an "aggrieved person or organization" on another basis.

However, we do address the ALJ's rejection of the conclusion by ALJ Tureck in *Alden Management Services, Inc.,* that, because the Departments of Labor and State work together in administering the H-1A program, it would violate Congressional intent to hold that the Department of Labor could not act on information supplied by Department of State. *See Alden*, slip op. at 5-6. Employing the test for judicial, rather than administrative standing, the ALJ here held that the State Department was not an aggrieved party because its "enforcement interest," namely, its ability to investigate visa and immigration fraud independent of the Department of Labor, would not be impaired if it could not initiate Department of Labor investigations by filing a complaint under the INRA and it therefore did not fall within the "zone of interests" protected by the statute. The ALJ also concluded that the State Department telegram was not a "complaint" within the meaning of the statute because State was not an "aggrieved party." R. D. & O. at 6. Because we distinguish judicial from administrative standing for the reasons already stated, we reject the ALJ's rationale that the proper test is one of judicial standing, and hold that the State Department is an "aggrieved person or organization" for the purposes of initiating a complaint under the INRA.

Furthermore, the Board finds the Respondents' arguments about standing unpersuasive. Beverly argues that the State Department telegram was not a complaint from an aggrieved party under the INRA. Because the statute authorizes the Secretary to issue regulations specifying those who constitute an "aggrieved party" but the Secretary has not done so, Beverly asserts the Administrator's interpretation of the term is not entitled to deference. As noted, we have not addressed that issue, because we have determined that the State Department is an "aggrieved party" on other grounds. Beverly also claims that the term "aggrieved party" is a term of art designating those who have "standing" to challenge agency action either before the agency or in court. More particularly, Beverly contends that the crucial determination is whether the party in question comes within the "zone of interests" protected by the statute. Moreover, Beverly says, the Administrator's point that the "zone of interests" test does not apply in administrative hearings is contrary to settled law.

The cases Beverly cites do not support the propositions for which they are cited, inasmuch as they are decided on principles of judicial, as distinct from administrative, standing. Beverly urges the Board to find that the Supreme Court's decision in *Director, Office of Workers' Compensation*

Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995) controls here. *Newport News Shipbuilding* is distinguishable. The issue was whether the Director of the Office of Workers' Compensation Programs had standing to appeal the denial of disability benefits by the Department of Labor's Benefits Review Board to the U.S. Court of Appeals, when the worker himself declined to pursue the claim. Pursuant to the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C.A. § 901 *et seq.* (West 2001), only a "person adversely affected or aggrieved" by the Board's order could appeal. 33 U.S.C.A. § 921(c)(West 2001). The Court found no authority for the proposition that the "policy interest" of "ensuring adequate compensation payments to claimants," 514 U.S. at 129, 132, was sufficient to establish judicial standing. The court reasoned that the Administrative Procedure Act (APA), 5 U.S.C.A. § 551(2)(West 1996), did not include agencies within the category of "person adversely affected or aggrieved" and when a federal agency is meant to have standing to seek judicial review, Congress specifically so provides. *Id.* at 130.

Later in the opinion, the Court discussed the standards applicable in assessing whether a party has standing to seek *judicial* review of agency action, *i.e.*, whether the party is injured in fact by agency action and whether "the interest he seeks to vindicate is arguably within the 'zone of interests' to be protected or regulated by the statute in question." *Id.* at 127. The Court held that an agency acting in its governmental capacity was not a "person adversely affected or aggrieved" under the APA. 514 U.S. at 130. However, *Newport News Shipbuilding* is readily distinguishable from this case, because the Court there was concerned with whether an administrative agency had standing to seek *judicial review* of a ruling of another administrative body, not with the distinct question here whether an agency has "*administrative standing*" to file a complaint initiating an investigation.

Beverly asserts that the Supreme Court's decision in *Lujan v. National Wildlife Federation,* 497 U.S. 871 (1990), holds that the "zone of interests" test for standing to seek judicial review applies to standing in administrative proceedings. Respondent's Memorandum at 22. But there was no administrative proceeding at issue at all in *Lujan*; the National Wildlife Federation filed an action in district court challenging the Department of the Interior's actions under the Federal Land Policy Management Act of 1976 and the National Environmental Policy Act of 1969. 497 U.S. at 875. The Court's entire discussion of standing revolved around the APA's *judicial* review provision, 5 U.S.C.A. § 702.

The holding in *Ecee, Inc. v. Federal Energy Reg. Comm'n*, 645 F.2d 339 (5th Cir. 1981), cited by Beverly, would not preclude the State Department's participation in this case. The Fifth Circuit held that the FERC could confer standing in administrative adjudications on parties that did not have a "legally cognizable interest" for purposes of judicial standing under the APA, relying on the same reasoning as in the cases discussed above and citing Judge Bazelon's concurring opinion in *Koniag*. 645 F.2d at 349-50.

III. Investigation and Determination within 180 Days

Finally, we hold that, whether the investigation was directed by the Administrator or initiated by a complaint, it was not time barred because it was not completed within 180 days.

The ALJ found that the Administrator did not complete this investigation and issue a determination within 180 days as required by the statute and regulation[4] and that, therefore, the Administrator's action was "time-barred . . .." R. D. & O. at 9-11. He rejected the Administrator's argument that, under *Brock v. Pierce County,* 476 U.S. 253 (1986), the 180-day period was only directory, not mandatory, because he found that this case concerned "private" not "public rights." R. D. & O. at 10. The ALJ held that where "private" rights are involved, time limits have been held to be "directory" only after a court considered the congressional purpose behind the legislation, and whether the respondent was prejudiced by the failure to comply with the time limit. He held that "the primary rights at issue here are those of the private nurses." *Id.* He found that this case, unlike *Pierce County*, did not involve recovery of misspent government funds but rather the Congressional purpose was to "alleviat[e] the national shortage of registered nurses." *Id.* He also found that Beverly "was significantly prejudiced by the delay in the completion of the investigation." *Id*. at 11. We disagree.

We note at the outset of this discussion that the 180-day limitation for the Administrator to investigate and make determinations under the INRA appears to apply only to investigations prompted by the complaint of an aggrieved person or organization.[5] Nevertheless, in order to avoid any ambiguity in light of today's decision concerning directed investigations, we find that the Administrator's authority to conduct directed investigations and issue subsequent determinations is also not subject to the 180-day limitation.

The ARB decision in *U.S. Department of Labor v. Nurses PRN of Denver*, ARB No. 97-131 (June 30, 1999) controls the resolution of this issue. In that case, an investigation was initiated on the basis of a complaint from an aggrieved organization. After the Board remanded for a determination of whether the Respondent Hospital had properly paid its non-H-1A nurses the prevailing wage, the hospital opposed the Administrator's further discovery on grounds that it was well past the 180-day time limit for completion of the investigation. The Board rejected that argument. It held:

> The 180-day limitation for conducting investigations at issue in the instant case carries none of the indicia that would divest the Administrator of the authority to investigate after expiration of the limitation. While their language may be mandatory, the statutory and regulatory provisions imposing the investigatory time limitation nowhere specify the consequences of a failure to meet the limitation. Ordinarily, if there is congressional or administrative intent to foreclose action in the event that a time limitation is not met, the statute or regulations specify consequences that flow from the failure to meet the limitation. *Brock v. Pierce County*, 476 U.S. 253, 259 (1986) (parallel limitations without specified consequences in Comprehensive Employment and Training Act and implementing

[4] 8 U.S.C.A. § 1182(m)(2)(e)(iii); 20 C.F.R. § 655.405(c), (d).

[5] 8 U.S.C.A. § 1182(m)(2)(E)(iii) ("Under this process," referring to (E)(ii), the complaint by an aggrieved party subsection of the INRA); 20 C.F.R. § 655.405 (c), (d).

> regulations were "intended to spur the Secretary to action, not to limit the scope of his authority"). Nothing in the legislative or regulatory history of the matters at issue here suggests an intent to bar agency action beyond the limitations period. Conducting an investigation and issuing a determination may pose unanticipated difficulties, and the ability of the Administrator to meet the limitation may be subject to factors beyond his control. Absent any statement of contrary intent, such a limitation provides a projected timetable for agency action on a given complaint, rather than curtailing the agency's authority to resolve complaints if the time limitation is not met. Mandatory language that an agency "shall" act within a limitations period, standing alone, "does not divest [the agency] of jurisdiction to act after that time."

Slip op. at 8-9.

Because of the authority of *Nurses PRN of Denver*, we do not feel compelled here to thoroughly address the ALJ's rationale for finding that the Administrator is barred by the time limitation. We do, however, disagree with the notion that this matter involves, primarily, private rights. The purpose of the INRA, "to alleviate the shortage of registered nurses," itself demonstrates a public interest in assuring high quality health care in the United States. The House Report on the legislation cited a report by the Secretary's Commission on Nursing (of the Department of Health and Human Services) that there was a shortage of over 137,000 nurses in hospitals and nursing homes alone, and that "[t]hese shortages have forced some hospitals, both urban and rural, to close beds and occasionally entire wings." 1989 U.S.C.C.A.N. at 1895. Also, discussing a companion provision in the bill that would allow certain foreign nurses already in the country to adjust to permanent resident status, the Report said "[m]any of the nurses affected by this legislation work in critical care and emergency service units and their leaving would have a profound effect on the quality of health care delivered to critically ill patients." *Id*. at 1895. Admission of alien nurses to alleviate the shortage of nurses also would have a significant effect on the quality of health care in the United States.

The Secretary's authority to impose civil money penalties also clearly indicates that public interests are involved. Such penalties do not inure to the benefit of any specific individual but act as a deterrent to prevent future violations of the act. 8 U.S.C.A. § 1182(m)(2)(E)(iv). *See U.S. v. LTV Steel Co., Inc.,* 269 B.R. 576, 583 (W.D. Pa. 2001). *Cf., U. S. v. General Motors Corp.,* 403 F. Supp. 1151, 1163 (D. Conn. 1975). In addition, securing back pay for nurses who were not paid the facility wage protects not only the interests of individual nurses in receiving the pay to which they were statutorily entitled, but protects domestic labor markets from the depressing effect of paying alien nurses below facility rates. *See Beverly Enterprises, Inc. v. Herman,* 119 F. Supp. 2d 1, 11(D. D. C. 2000).

Thus, the INRA requirement that the Administrator shall file a determination within 180 days of receiving a complaint does not bar her from prosecuting this case.

CONCLUSION

For the reasons discussed above, we hold that the Department of Labor regulations implementing the INRA authorize directed investigations without a complaint from an aggrieved person where the Administrator has reason to believe a violation of the INRA has occurred. We also hold that the State Department is an "aggrieved person" under the Act and that its telegram qualifies as a complaint. Finally, we hold that the Administrator is not limited to 180 days to investigate and determine whether violations of the attestation have occurred.

Accordingly, we **REMAND** this matter to the Administrative Law Judge for further proceedings consistent with this order.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge