In the Matter of:

VINAYAK JOSHI, ANUPAM KUMAR, JAGADISH THOSECAN, RAJINDER SINGH, KRISHNANANDA BHANDARI ADKA, SRIRAM SUBRAMANIAM, SRINIVAS TANGIRALA, VENKATESH IYENGAR, SUNDARAM SUNDARARAMAN,

PETITIONERS,

v.

PEGASUS CONSULTING GROUP, INC.,

RESPONDENT.

ARB CASE NO. 03-034

ALJ CASE NO. 2001-LCA-29

DATE: July 29, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioners:
Richard M. Schall, Esq., Patricia A. Barasch, Esq., ***Schall & Barasch, LLC, Moorestown, New Jersey***

For the Respondent:
Roy D. Ruggiero, Esq., ***Moorestown, New Jersey***

FINAL ORDER OF DISMISSAL

On November 13, 2002, a Labor Department Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) pursuant to 8 U.S.C.A. § 1182(n)(2) (West 1999), the enforcement provision of the H-1B visa program of the Immigration and Nationality Acts, as amended, and implementing regulations at 20 C.F.R. Part 655 (2003). *Administrator, Wage and Hour Div. v. Pegasus Consulting Group, Inc.*, ALJ No. 2001-LCA-00029. The Administrator brought the action against Pegasus on behalf of nineteen H-1B workers to recover wage deficiencies. The

petitioners in this appeal did not participate as parties in the administrative law hearing below. For that reason, we dismiss the petitioners' petition for review.

BACKGROUND

The Immigration and Nationality Act defines various classes of aliens who may enter the United States for prescribed periods of time and for prescribed purposes under the various types of visas. 8 U.S.C.A. § 1101(a)(15). One class of aliens, known as "H-1B" workers, is allowed entry to the United States on a temporary basis to work in "specialty occupations." *Id.* at § 1101(a)(15)(H)(i)(B); 20 C.F.R. § 655.700.

"Specialty occupation" means an occupation that requires theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's degree or higher in the specific speciality. 8 U.S.C.A. § 1184(i); 20 C.F.R. § 655.715. The Immigration and Nationalization Service (INS) identifies and defines the occupations covered by the H-1B category and determines an alien's qualifications for such occupations. The Labor Department administers and enforces the labor condition applications relating to the employment. 20 C.F.R. § 655.705; 59 Fed. Reg. 65,646 (Dec. 20, 1994).

To hire an H-1B worker, the employer must file a Labor Condition Application (LCA) with the Employment and Training Administration of the United States Department of Labor. In the LCA, the employer must make certain representations and attestations regarding his responsibilities, including a representation that the alien will be paid at the actual wage level paid to all other individuals with similar experience and qualifications for the employment in question or the prevailing wage for the occupational classification in the area of employment. 8 U.S.C.A. § 1182(n).

After the Labor Department certifies the LCA, the employer submits a copy of the certified LCA to the INS along with the non-immigrant visa petition to ask for an H-1B classification for the worker. 20 C.F.R. § 655.700. If the H-1B classification is approved by the INS, the non-immigrant can apply for an H-1B visa at a consular office for entry into the United States or for a change in his or her visa status if the non-immigrant is already in the United States. The employer can hire the H-1B worker after the INS grants the visa for access to the United States.

Among other things, the Immigration and Nationality Act requires H-1B employers to pay the required wage for both productive and non-productive time. Non-productive time, or "benching," occurs when the employer does not assign the H-1B worker to a client because of lack of work. 20 C.F.R. § 655.731(c). The employer's duty to pay the required wage ends when a bona fide termination occurs. A bona fide termination does not occur if the employer rehires the "terminated" or "laid off" employee. 20 C.F.R. § 655.

Pegasus is a management computer consulting firm which provides consulting services to clients throughout the United States. Tr. 20.[1] In 1998, a large number of computer professionals answered a newspaper ad placed by a Pegasus affiliate in India seeking experienced computer

[1] References to the transcript of the ALJ hearing below are indicated by "Tr."

professionals to work in the United States. Tr. 11. Pegasus brought some of these individuals to the United States. During their tenure with Pegasus, 19 computer specialists experienced "down" time when they were not assigned to a client and were not paid. Tr. 22 – 23.

After an investigation, the Administrator concluded that Pegasus failed to pay required wages for non-productive time and/or failed to effect bona fide terminations with respect to 19 of H-1B employees. Accordingly, the Administrator brought the instant enforcement action on their behalf to collect wage deficiencies in the amount of $288,218.04. The Administrator also sought a $40,000 civil money penalty for willful noncompliance. D. & O. at 2.

After a hearing on the merits, the ALJ ordered Pegasus to pay wage deficiencies totaling $231,279.41, found the violations willful, and assessed $40,000 in civil money penalties. *Id.* at 9.

DISCUSSION

This Board has authority to review ALJ H-1B decisions pursuant to 29 C.F.R. § 655.845(a), which provides in relevant part:

> **§ 655.845 What rules apply to appeal of the decision of the administrative law judge?**
>
> (a) The Administrator or any interested party desiring review of the decision and order of an administrative law judge, including judicial review, shall petition the Department's Administrative Review Board (Board) to review the decision and order. To be effective, such petition shall be received by the Board within 30 calendar days of the date of the decision and order.

Implementing regulation 29 C.F.R. § 655.825(a) provides that the Department's general rules of procedure for ALJ hearings apply to H-1B hearings:

> **§ 655.825 What rules of practice apply to the hearing?**
>
> (a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

In *Administrator v. HCA Med. Ctr. Hosp.*, No. 94-ARN-1 (ARB June 28, 1996), this Board held that persons who wish to participate as parties in administrative adjudication of H-1A enforcement actions must attain "party" status as provided in 29 C.F.R. Part 18. Section 18.10(c), "Parties, how designated," requires a would-be party to establish party status at the hearing:

> (c) A person or organization wishing to participate as a party under this section shall submit a petition to the [ALJ] . . . which shall concisely state (1) Petitioner's interest in the proceeding, (2) how his or her participation as a party will contribute materially to the disposition of the proceeding, (3) who will appear for petitioner, (4) the issues on which petitioner wishes to participate, and (5) whether petitioner intends to present witnesses.

29 C.F.R. § 18.10(c); *cf*, 29 C.F.R. § 18.2(g) ("*Party* means a person or agency named or admitted as a party to a proceeding").

Only the Administrator and Pegasus participated as parties within the meaning of Part 18 at the administrative law hearing below. Each timely petitioned for review pursuant to 20 C.F.R. § 655.845(a), ARB Nos. 03-032 and 03-033. Under *HCA*, the Administrator and Pegasus were, indubitably, "interested parties" within the meaning of § 655.845(a).

Nine of the Pegasus employees on whose behalf the Administrator prosecuted below, filed the instant petition for review, relying on § 655.845(a). However, these employees were not parties to the administrative law hearing below. Under *HCA*, they are therefore not "interested parties" within the meaning of § 655.845(a). The employees suggest no basis for departing from the precedent established in *HCA* that only parties as defined in Part 18 can participate in the administrative adjudication of an H-1B case.

CONCLUSION

Accordingly, ARB docket number 03-034 is **DISMISSED.**

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge