



In the Matter of:

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

ARB CASE NO. 04-076

ALJ CASE NO. 2003-LCA-022

PROSECUTING PARTY,

DATE: June 30, 2006

v.

SYNERGY SYSTEMS, INCORPORATED,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

Joan Brenner, Esq., Paul L. Frieden, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., *United States Department of Labor, Washington, D.C.*

For the Respondent:

James R. Gotcher, Esq., *The Gotcher Law Group, PC, Sherman Oaks, California*

FINAL DECISION AND ORDER

The Immigration and Nationality Act (INA or the Act)¹ requires that employers pay a certain, prescribed wage to the nonimmigrant alien workers whom they hire, even if the nonimmigrant is in a nonproductive status (i.e., not performing work) due to a decision by the employer, such as the lack of assigned work. The Administrator of the United States Department of Labor's Wage and Hour Division contends that Synergy

¹ 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2004) and implemented at 20 C.F.R. Part 655, Subparts H and I (2006).

Systems, Incorporated, (Synergy) violated the Act when it did not pay two nonimmigrant alien workers during periods when they performed work and when they were in a nonproductive status. A Department of Labor (DOL) Administrative Law Judge (ALJ) ruled in favor of the Administrator and the two employees. Synergy appealed. We affirm the ALJ's decision with some modification.

REGULATORY FRAMEWORK

The INA permits employers in the United States to hire nonimmigrant alien workers in specialty occupations. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b). These workers commonly are referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the specialty. 8 U.S.C.A. § 1184(i)(1). To employ H-1B nonimmigrants, the employer must fill out a Labor Condition Application (LCA). 8 U.S.C.A. § 1182(n). The LCA stipulates the wage levels that the employer guarantees for the H-1B nonimmigrants. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 655.732. After securing DOL certification for the LCA, the employer petitions for and the nonimmigrants receive H-1B visas from the State Department after Immigration and Naturalization Service (INS) approval. 20 C.F.R. § 655.705(a), (b).²

An employer violates the INA if it fails to pay an H-1B nonimmigrant for work performed or when the worker is in "nonproductive status" for employment-related reasons. Employment-related nonproductive status results from factors such as lack of available work for the nonimmigrant or lack of a permit or license. 8 U.S.C.A. § 1182(n)(2)(C)(vii); 20 C.F.R. § 655.731(c)(7)(i). But an employer need not compensate a nonimmigrant if it has effected a "*bona fide* termination" of the employment relationship. 20 C.F.R. § 655.731(c)(7)(ii). The employer must notify the INS that it has terminated the employment relationship so that the INS may revoke approval of the H-1B visa. 8 C.F.R. § 214.2(h)(11) (2005).

BACKGROUND

At all relevant times, Synergy was a California contractor firm that provided computer support services to other businesses. Administrative Law Judge's Exhibit (ALJX) 6 at 10. Synergy submitted the LCA at issue to the DOL on May 18, 2000, seeking certification to employ as many as 20 H-1B nonimmigrants to work as program analysts at a prevailing wage rate of \$44,000 per year. The DOL certified the LCA on June 1, 2000. Prosecuting Party's Exhibit (PX) 12; ALJX 6 at 4-5. Ramesh Balakrishnan and Durgesh Trimbakkar were citizens of India who came to the United States in 2000 under H-1B nonimmigrant visas. ALJX 6 at 6, 15. In February 2001, Balakrishnan and Trimbakkar began working for Synergy and were assigned contract

² The INS is now the "U.S. Citizenship and Immigration Services" or "USCIS." See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002).

projects for Synergy clients. ALJX 3 at 14-15; Hearing Transcript (HT) at 19-20. The petitions for H-1B visas for Balakrishnan and Trimbakkar that Synergy submitted indicated that they were to be paid \$45,000 per year. ALJX 6.

Both Balakrishnan and Trimbakkar testified that, in March 2001, before they received a paycheck, they each received a \$1,500 check from Synergy, labeled “advance loan.” ALJX 3 at 17-18 (Exhibit 1); HT at 24-25; PX 6-7. Subsequent paycheck earnings statements indicate that \$1,000 was deducted from both Balakrishnan’s and Trimbakkar’s wages as repayment for the “advance.” PX 4 at 0; PX 5 at 1. Between February 2001 and September 2001, Balakrishnan and Trimbakkar worked on various assigned contracted projects for Synergy clients and for varying durations. After Balakrishnan stopped working for Synergy, he filed a complaint with the DOL on November 1, 2001, alleging that Synergy had failed to pay him all of the required wages he believed he was owed. ALJX 7.

After conducting an investigation, the DOL’s Wage and Hour Division Administrator issued an April 15, 2003 determination that Synergy violated the H-1B provisions of the INA. PX 1-3. The Administrator found that Synergy willfully failed to pay Balakrishnan and Trimbakkar \$12,115.38 in required wages for nonproductive time. And since the violation was willful, the Administrator also assessed a civil money penalty of \$5,000 against Synergy. In addition, the Administrator determined that Synergy failed to pay Balakrishnan and Trimbakkar \$11,340.43 in required wages for certain periods of productive work between February and September 2001. Specifically, the Administrator calculated that Synergy owed Balakrishnan \$6,304.94 in back wages and owed Trimbakkar \$17,150.87 in back wages. PX 2. Finally, the Administrator determined that Synergy violated the Act when it failed to provide Balakrishnan and Trimbakkar with a copy of the LCA and failed to make it available for public examination. The Administrator did not assess civil money penalties for those violations. Synergy appealed the Administrator’s determination, and the case was assigned to the ALJ for a hearing.

The ALJ conducted a hearing and issued a Decision and Order (D. & O.) on March 5, 2004. In ruling on Synergy’s post-hearing jurisdictional arguments, the ALJ held that since Balakrishnan filed a timely complaint with the DOL though Trimbakkar did not, the Administrator had jurisdiction over the alleged violations involving both Balakrishnan and Trimbakkar. D. & O. at 16. In addition, the ALJ held that the Administrator’s failure to comply with statutory time limits in conducting an investigation and determining whether the complaint had merit did not preclude the Administrator from exercising jurisdiction. He also ruled that the fact that a hearing was not scheduled within 60 days from the date the Administrator should have made a determination did not prevent the Administrator from prosecuting the case. D. & O. at 16-17.

As for the back wages, the ALJ noted that at the hearing the Administrator had corrected the calculations as to what Synergy specifically owed to Balakrishnan and Trimbakkar individually. D. & O. at 17, 20, 22. The Administrator indicated that

Balakrishnan is actually owed \$8,035.71 in back wages (or an additional \$1,730.77) and Trimbakkar is owed \$15,420.10 (or a reduction of \$1,730.77) in back wages. HT at 215-216.³

The ALJ then found that Balakrishnan and Trimbakkar worked for Synergy, without any legitimate leaves of absence, from February 1, 2001, until the end of October 2001. D. & O. at 17-20. Therefore, the ALJ held that Synergy owed Balakrishnan and Trimbakkar the amounts that the Administrator calculated, but he reduced the amounts owed to each by \$500 to account for the remaining portion of the \$1,500 “advance loan” they each had received but never was deducted from their subsequent wages or paychecks. D. & O. at 20, 22. Finally, the ALJ concluded that Synergy willfully failed to pay Balakrishnan and Trimbakkar required wages for nonproductive time in May and June 2001 and, therefore, adopted the Administrator’s recommended civil money penalty of \$5,000 against Synergy. D. & O. at 21.⁴ Synergy filed a timely petition for review. See 20 C.F.R. § 655.655.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB or the Board) has jurisdiction to review an ALJ’s decision concerning the INA. 8 U.S.C.A. § 1182(n)(2) and 20 C.F.R. § 655.845. See also Secretary’s Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary’s authority to review cases arising under, inter alia, the INA).

Under the Administrative Procedure Act, the Board, as the designee of the Secretary of Labor, acts with “all the powers [the Secretary] would have in making the initial decision” 5 U.S.C.A. § 557(B) (West 1996), quoted in *Goldstein v. Ebasco Constructors, Inc.*, 1986-ERA-36, slip op. at 19 (Sec’y Apr. 7, 1992). The Board engages in de novo review of an ALJ’s INA decision. *Yano Enters., Inc. v. Administrator*, ARB No. 01-050, ALJ No. 2001-LCA-0001, slip op. at 3 (ARB Sept. 26, 2001); *Administrator v. Jackson*, ARB No. 00-068, ALJ No. 1999-LCA-0004, slip op. at 3 (ARB Apr. 30, 2001). See generally *Mattes v. United States Dep’t of Agric.*, 721 F.2d

³ The ALJ erred in stating that the Administrator indicated that Balakrishnan was actually owed \$8,035 in back wages, as a review of the hearing transcript reveals that the Administrator indicated that Balakrishnan was actually owed \$8,035.71 in back wages, or an additional .71 cents. HT at 215-216.

⁴ The ALJ also determined that, while the weight of the evidence did not establish that Synergy failed to make the LCA at issue available for public examination pursuant to 20 C.F.R. § 655.760(a), Synergy did fail to send Balakrishnan and Trimbakkar copies of the LCA by their first day of work in accordance with 20 C.F.R. § 655.734(a)(3). Like the Administrator, the ALJ did not impose any civil money penalty for the violation. D. & O. at 21-22. The parties do not contest these findings.

1125, 1128-1130 (7th Cir. 1983) (rejecting argument that higher level administrative official was bound by ALJ's decision); *McCann v. Califano*, 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's decision by higher level administrative review body).

ISSUES

1. Did the Administrator have the authority to investigate Synergy regarding INA violations involving a nonimmigrant employee who did not file a timely complaint?
2. Did the Administrator's failure to comply with the statutory deadline to conduct an investigation and issue a determination deprive the Administrator of jurisdiction to prosecute the case or prejudice Synergy's defense? Did DOL's Office of Administrative Law Judges's (OALJ) failure to comply with the statutory deadline to provide a hearing preclude the Administrator from prosecuting the case or prejudice Synergy?
3. Are Balakrishnan and Trimbakkar entitled to back pay?
4. Did Synergy willfully violate the INA ?

DISCUSSION

1. Jurisdiction

The Administrator had the authority to investigate INA violations involving Trimbakkar.

Synergy contends that because the record contains no evidence that Trimbakkar filed a complaint as an aggrieved person within 12 months after the termination of his employment with Synergy, the Administrator did not have the authority to investigate Synergy regarding any INA violations involving Trimbakkar.⁵ Synergy Brief at 2-3. In

⁵ 8 U.S.C.A. § 1182(n)(2)(A) states:

The Secretary shall establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application submitted under paragraph (1) or a petitioner's misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the

response, the Administrator argues that because Balakrishnan timely filed a complaint, the Administrator had the authority to investigate Synergy regarding not only any INA violations involving Balakrishnan, but any other INA violations, including those involving Trimbakkar. Administrator's Brief at 23-25.

The ALJ determined that Balakrishnan's complaint under section 1182(n)(2)(A) encompasses not only his grievances "but also all other similar violations involving the same LCA, even if those other violations involve other aggrieved persons who were not identified by the person making the complaint." D. & O. at 16. Thus, the ALJ concluded that Balakrishnan's complaint provided a sufficient basis for exercising jurisdiction over the alleged violations involving both Balakrishnan and Trimbakkar.

The Administrator has the authority to investigate Synergy's alleged INA violations involving Trimbakkar even in the absence of a complaint. "The Administrator, *either* pursuant to a complaint or *otherwise*, shall conduct such investigations as appropriate." 20 C.F.R. § 655.800(b) (emphasis added). In *Adm'r v. Beverly Enter., Inc.*, ARB No. 99-050, ALJ No. 98-ARN-3, slip op. at 9-10 (ARB July 31, 2002), a case brought under the Immigration Nursing Relief Act of 1989, 8 U.S.C.A. §§ 1101 *et seq.* (West 1999) and its implementing regulation at 20 C.F.R. § 655.400(b), which contains the same language as 20 C.F.R. § 655.800(b), we held that the Secretary of Labor could act, complaint or not, when a facility seeking to employ a nurse is allegedly violating the terms of an LCA. Synergy's construction of the INA and 20 C.F.R. § 655.800(b) would have the Administrator "stand idly by, despite having received, as here, serious allegations from a credible source." *Beverly Enter., Inc.*, slip op. at 10. Thus, the Administrator had the authority to investigate alleged INA violations involving Trimbakkar.

The Administrator and OALJ's failure to comply with statutory deadlines does not deprive the Administrator of jurisdiction to prosecute the case. Nor did such failure prejudice Synergy.

Synergy also argues that since the Administrator did not issue a determination (whether a reasonable basis existed that Synergy violated the Act) within 30 days after Balakrishnan filed his complaint and since the DOL's Office of Administrative Law Judges (OALJ) did not provide an opportunity for a hearing within the next 60 days, the Administrator lacks jurisdiction to proceed against Synergy.⁶ Synergy also contends that

complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively.

See also 20 C.F.R. § 655.806(a)(5) (A complaint must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed).

⁶ 8 U.S.C.A. § 1182(n)(2)(B) states:

Under such process, the Secretary shall provide, within 30 days after the date such a complaint is filed, for a

the Administrator's delays in issuing a determination prejudiced its opportunity to depose other Synergy employees who could contradict Balakrishnan and Trimbakkar's allegations. In response, the Administrator contends that the statute's requirements that the Administrator "shall" issue a determination within 30 days of the complaint and the OALJ "shall" provide an opportunity for a hearing within 60 days of a determination, without stating anything more or specifying any consequence for failing to do so, are merely directory instructions and not jurisdictional bars. Moreover, according to the Administrator, Synergy failed to show any actual prejudice it suffered as a result of any delay.

The ALJ held that the failure to comply with the statutory time limits did not preclude the Administrator from exercising jurisdiction. D. & O. at 16-17. As authority, he cited *Brock v. Pierce County*, 476 U.S. 253 (1986). In *Pierce County*, the Supreme Court held that the Comprehensive Employment and Training Act's⁷ use of the word "shall" when setting deadlines for agency action, standing alone, cannot be jurisdictional and is not enough to remove the Secretary of Labor's power to act after the deadline has expired. A contrary interpretation would permit agency inaction to prejudice both the public interest that the statute addresses and individual complainants seeking to enforce their rights. *Pierce County*, 476 U.S. at 261-262. The Court held that such a statutory deadline "was clearly intended to spur the Secretary [of Labor] to action, not to limit the scope of his authority." 476 U.S. at 265. We conclude that the rationale of the holding in *Pierce County* applies here. Thus, the Administrator and OALJ's failure to comply with the statutory deadlines did not remove the Administrator's jurisdiction to prosecute the case.⁸

determination as to whether or not a reasonable basis exists to make a finding described in subparagraph (C). If the Secretary determines that such a reasonable basis exists, the Secretary shall provide for notice of such determination to the interested parties and an opportunity for a hearing on the complaint, in accordance with section 556 of Title 5, within 60 days after the date of the determination. If such a hearing is requested, the Secretary shall make a finding concerning the matter by not later than 60 days after the date of the hearing. In the case of similar complaints respecting the same applicant, the Secretary may consolidate the hearings under this subparagraph on such complaints.

See also 20 C.F.R. §§ 655.806(a)(3), 655.835(c).

⁷ 29 U.S.C.A. § 816(b) (West 1976, Supp. V).

⁸ We note that it appears that both the ALJ and the Administrator have mischaracterized the *Pierce County* holding. Both read *Pierce County* as holding that government agencies do not lose jurisdiction for failure to comply with statutory time limits unless the statute "both expressly requires an agency or public official to act within a particular time period *and* specifies a consequence for failure to comply with the provision."

We also reject Synergy's contention that the Administrator's delays in issuing a determination prejudiced its opportunity to depose other Synergy employees. Although excessive delay prior to a hearing may create a presumption of prejudice, Synergy must demonstrate actual prejudice to warrant dismissal of a case. *See Ray Wilson Co.*, ARB No. 02-086, ALJ No. 2000-DBA-14, slip op. at 6-7 (Feb. 27, 2004). Synergy cannot claim actual prejudice because as early as December 2001, Synergy was aware that the Administrator was investigating Balakrishnan's complaint and had the opportunity to collect favorable testimony and evidence then available. *See* HT at 305-306. Synergy did not show that it even attempted, but failed, to depose any of its employees or former employees.

2. Synergy Owes Balakrishnan and Trimbakkar Back Wages

Synergy argues that the ALJ erred in finding that Balakrishnan and Trimbakkar were entitled to full wages for the period between February 1, 2001, and the end of October 2001. It claims that both were either on leave of absence during that period or had been terminated before October 31, 2001. Specifically, Synergy asserts that the ALJ erred in crediting the employee interview statements that DOL investigators took from Gita Rowlands, a Synergy receptionist. The statements indicate that Balakrishnan and Trimbakkar reported to work at Synergy's office during periods in which Synergy management officials allege Balakrishnan and Trimbakkar were on leave of absence.

D. & O. at 16; Administrator's Brief at 25-26. To the contrary, the Court explained in holding that the Secretary had not forfeited its jurisdiction under the facts of that case:

We need not, and do not, hold that a statutory deadline for agency action can never bar later action unless that consequence is stated explicitly in the statute. In this case, we need not go beyond the normal indicia of congressional intent to conclude that § 106(b) [of the Comprehensive Employment and Training Act] permits the Secretary to recover misspent funds after the 120-day deadline has expired.

476 U.S. at 262 n.9. The quotation upon which both the ALJ and the Administrator rely in stating that the statute must specify a consequence for failure to comply is simply the Court's acknowledgement of the appellate precedent upon which the Secretary relied; it is not a statement of the Court's holding in the case. *See* 476 U.S. at 259; *see also United Gov't Security Officers, Local # 50*, ARB No. 05-157, slip op. at 7 n.34 (Dec. 29, 2005). To the extent that this Board has also previously relied on such a mischaracterization of the holding in *Pierce County*, we hereby properly enunciate the *Pierce County* holding. *See e.g., Alden Mgmt. Serv., Inc.*, ARB Nos. 00-020, 00-021, slip op. at 5; *Beverly Enters., Inc.*, ARB No. 99-050, slip op. at 17-18; *The Law Co., Inc.*, ARB No. 98-107, slip op. at 13 (ARB Sept. 30, 1999); *Adm'r v. Nurses PRN of Denver, Inc.*, ARB No. 97-131, ALJ No. 94-ARN-1, slip op. at 8 (ARB June 30, 1999).

Synergy maintains that Rowlands's deposition testimony contradicts these statements. In addition, Synergy argues that, while the ALJ did not believe Trimbakkar's testimony that he worked with Synergy until the end of October 2001, the ALJ failed to adequately explain how he nevertheless found that the evidence of record established that Trimbakkar did in fact work with Synergy until the end of October 2001. Synergy claims that it terminated Trimbakkar's employment in September 2001. Finally, Synergy contends that the ALJ did not adequately explain how he calculated the amount of back wages owed to Balakrishnan and Trimbakkar. Synergy Brief at 5-7.

The ALJ found that neither the testimony of Balakrishnan and Trimbakkar, nor the testimony of Synergy management officials, was reliable or credible. D. & O. at 17-19. Instead, the ALJ relied on the documentary evidence, which included payroll records, earnings statements, time sheets, employee status reports, the LCA and H-1B petitions, medical insurance records, employee interview statements, and a written request for leave and e-mail messages from Trimbakkar. He found that Balakrishnan and Trimbakkar worked continuously for Synergy, without ever taking any leave of absence, from February 1, 2001 through the end of October 2001. D. & O. at 19-20. Although the ALJ found that Trimbakkar's testimony that he worked with Synergy until the end of October 2001 was inconsistent with a separation agreement he had signed and with Synergy's payroll records indicating that his employment with Synergy ended in September 2001, the ALJ also noted that Synergy did not produce any records that it had notified the INS that it had terminated either Balakrishnan or Trimbakkar. D. & O. at 17-18. Moreover, the ALJ characterized documents indicating that Balakrishnan and Trimbakkar had taken leaves of absence during their employment with Synergy as "phony," "bogus," and inconsistent with Rowlands's statements that they continued to report to work at Synergy's office during their "purported" leaves of absence. D. & O. at 18-19. Thus, the ALJ held that Synergy owed Balakrishnan and Trimbakkar the amounts that the Administrator calculated, but he reduced those amounts by \$500 to account for the remaining portion of the \$1,500 "advance loan" each received but was never deducted from their subsequent wages. D. & O. at 20, 22.

Under its "no benching" provisions, the INA requires that an employer pay the required wage specified in the LCA even if the H-1B nonimmigrant employee is in a nonproductive status (i.e., not performing work) because of lack of assigned work or some other employment-related reason. 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(6)(ii), (7)(i); *Administrator v. Kutty*, ARB No. 03-022, ALJ Nos. 01-LCA-010 through 01-LCA-025, slip op. at 7 (ARB May 31, 2005); *Rajan v. International Bus. Solutions, Ltd.*, ARB No. 03-104, ALJ No. 03-LCA-12, slip op. at 7 (ARB Aug. 31, 2004). But an employer need not pay wages to H-1B nonimmigrants that are in nonproductive status due to conditions that remove the nonimmigrants from their duties at their "voluntary request and convenience" or which render them unable to work, such as a requested leave of absence. 20 C.F.R. § 655.731(c)(7)(ii).

We find that the record supports the ALJ's finding that Balakrishnan and Trimbakkar were available to work continuously for Synergy from February 1, 2001, through the end of October 2001 and never took a legitimate leave of absence during that

time. Contrary to Synergy's contention, Rowlands's statements to the Administrator's investigator that Balakrishnan and Trimbakkar worked eight hours a day at Synergy's office in May 2001 are not necessarily inconsistent with her subsequent deposition testimony. PX 11. Rowlands testified that Balakrishnan and Trimbakkar came into the office most days in May 2001 for at least four to six hours a day. HT at 24, 26, 30. In any event, whether Balakrishnan and Trimbakkar reported to the office or not while they were in a nonproductive status because of lack of assigned work, Synergy was required to pay them the wages due under the LCA. 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(6)(ii), (7)(i); *Kutty*, slip op. at 7; *Rajan*, slip op. at 7.

Synergy also submits that Trimbakkar's employment was terminated in September 2001. The relevant INA regulation pertaining to termination specifies that wage payments "need not be made if there has been a *bona fide* termination of the employment relationship" and that "INS regulations require the employer to notify the INS that the employment relationship has been terminated so that the [H-1B] petition is canceled (8 C.F.R. 214.2(h)(11))." 20 C.F.R. § 655.731(c)(7)(ii). And the applicable INS regulation provides that an H-1B petitioner, such as Synergy, shall "immediately" notify the INS if it "no longer employs the beneficiary." 8 C.F.R. § 214.2(h)(11)(i)(A). Synergy produced one witness who testified that she mailed the notice of Trimbakkar's termination to the INS. But in light of the ALJ's finding that none of the witnesses were entirely credible and in light of the fact that Synergy did not produce a record that it notified the INS, we find that Trimbakkar's alleged termination in September 2001 was not *bona fide*. Thus, Synergy is liable for wages owed to Trimbakkar for October 2001.

Synergy further contends that the ALJ did not explain how he determined the amount of back wages he awarded to Balakrishnan and Trimbakkar. Synergy Brief at 6. We assume that Synergy is arguing that since the record does not support the ALJ's back wage calculations, we should vacate the back wage awards. But since the ALJ accepted the Administrator's back wage calculations (though he reduced them by \$500) and Synergy did not contest those calculations at the hearing below, Synergy waived this argument. *Saporito v. Central Locating Serv., Ltd.*, ARB No. 05-004, ALJ No. 2001-CAA-00013, slip op. at 9 (ARB Feb. 28, 2006). Moreover, the Administrator is vested with "enforcement discretion" and considers the totality of circumstances "in fashioning remedies appropriate to the violation," 65 Fed. Reg. at 80180 (2000). Under 20 C.F.R. § 655.810(e)(2) "the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate," "including . . . back wages to workers . . . whose employment has been terminated in violation of these provisions." Therefore, we will not disturb the Administrator's calculations because the record contains no evidence that they are arbitrary or an abuse of discretion.

The ALJ did err, however, in reducing the amounts owed to Balakrishnan and Trimbakkar by \$500 to account for the remaining portion of the \$1,500 "advance loan" each received but was never deducted from their subsequent wages. Payments to H-1B workers do not qualify as "wages paid" unless they are:

- (i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for authorized deductions;
- (ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS

20 C.F.R. § 655-731(c)(2)(i)-(ii). *See also* 59 Fed. Reg. 65,646; 65,652-53 (Dec. 20, 1994) (amounts to be treated as "wages paid" shall be paid to the employee free and clear when due); *Administrator v. Pegasus Consulting Group, Inc.*, ARN Nos. 03-032, 03-033; ALJ No. 2001-LCA-29, slip op. at 10 (June 30, 2005).

The first payments Synergy made to Balakrishnan and Trimbakkar were \$1,500 checks labeled "advance loan." ALJX 3 at 17-18 (Exhibit 1); HT at 24-25; PX 6-7. Subsequent paycheck earnings statements indicate that \$1,000 was deducted from both Balakrishnan's and Trimbakkar's wages as repayment for the "advance." PX 4 at 0; PX 5 at 1. But the "advance loan" checks that Synergy provided to Balakrishnan and Trimbakkar do not qualify as "wages paid" because they were not shown on Synergy's payroll records, and the record contains no evidence that Synergy reported them to the IRS. Thus, the \$1,500 should not have been deducted from the wages owed to Balakrishnan and Trimbakkar. Therefore, the \$1,000 previously deducted from the wages of Balakrishnan and Trimbakkar must be added to the Administrator's determination that Synergy owed Balakrishnan \$8,035.71 and owed Trimbakkar \$15,420.10. *See* HT at 215-216. Consequently, we hold that Synergy owes Balakrishnan \$9,035.71 in back wages and owes Trimbakkar \$16,420.10 in back wages.

Finally, Synergy also contends in its petition for review that the ALJ erred because he did not permit it to inquire into the post-termination immigration status of Balakrishnan and Trimbakkar. We reject this argument for two reasons. First, in a pre-hearing ruling denying Synergy's request to inquire into the immigration status, the ALJ relied on case-law arising under the Fair Labor Standards Act holding that an employee's immigration status is not relevant in a case in which unpaid wages are being sought for work already performed.⁹ This ruling is consistent with the Board's holding in *Administrator v. Ken Tech., Inc.*, ARB No. 03-140, ALJ No. 2003-LCA-00015, slip op. at 5 (ARB Sep. 30, 2004) (whether employee was undocumented is not at issue in an H-1B case). And second, we note that at the hearing the ALJ did permit Synergy to question Trimbakkar regarding his immigration status as of February 2002. HT at 69-74, 87-92.

⁹ See June 12, 2003 Ruling On Prosecuting Party's Motion *In Limine* citing *Flores v. Amigon*, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002); *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191,192 (S.D.N.Y. 2002); *Flores v. Albertson's, Inc.*, 2002 WL 1163623 (C.D. Cal. 2002).

3. Civil Money Penalties and Disqualification

The Act provides that the Administrator “may” assess civil money penalties up to \$1,000 for non-willful violations and up to \$5,000 for willful violations or for discrimination. 8 U.S.C.A. § 1182(n)(2)(C)(i)-(ii); 20 C.F.R. § 655.810(b)(1)-(2)(i)-(iii). The Administrator assessed Synergy \$5,000 in civil money penalties because he found that it willfully failed to pay Balakrishnan and Trimbakkar required wages for nonproductive time. PX 1.

The ALJ agreed that the violation was willful because the evidence showed that Synergy generated and retained written records which falsely suggested that Balakrishnan and Trimbakkar were on leave of absence during periods when they were in fact working in Synergy’s office. D. & O. at 20. “Willful” is defined as “a knowing failure or a reckless disregard with respect to whether the conduct was contrary to” the INA. 20 C.F.R. § 655.805(c); D. & O. at 20. We find that the Administrator and the ALJ correctly concluded that Synergy’s failure to pay such wages was willful because the record supports such a conclusion.

The regulations specify seven factors that may be considered in determining the amount of the civil money penalties to be assessed: previous history of violations by the employer, the number of workers affected, the gravity of the violations, the employer’s good faith efforts to comply, the employer’s explanation, the employer’s commitment to future compliance, the employer’s financial gain due to the violations or potential financial loss, injury or adverse effect to others. 20 C.F.R. § 655.810(c).

The ALJ considered these factors and concluded that the Administrator’s decision to assess a \$5,000 civil money penalty was appropriate. D. & O. at 21. The Administrator is vested with “enforcement discretion” “in fashioning remedies appropriate to the violation.” 65 Fed. Reg. at 80,180. *See also* 8 U.S.C.A. § 1182(n)(2)(C)(i)-(ii); 20 C.F.R. § 655.810(b)(1)-(2)(i)-(iii), (e)(2), (f). Thus, since the record demonstrates that the Administrator did not abuse his discretion, we will not modify the ALJ’s finding that the Administrator’s assessment was appropriate.

Finally, the Act compels the Secretary of Labor to notify the Attorney General in the event the Secretary finds that an “employer” has willfully violated the Act. The Attorney General then must disqualify the employer from employing H-1B nonimmigrants for at least two years. 8 U.S.C.A. § 1182(n)(2)(C)(ii). Consequently, since we have affirmed the ALJ’s finding that Synergy willfully violated the Act, the Attorney General shall disqualify Synergy for at least two years.

CONCLUSION

The Administrator proved by a preponderance of the evidence that Synergy willfully violated the Act when it did not pay Balakrishnan and Trimbakkar the required wages. Moreover, the Administrator’s assessment of civil money penalties is reasonable.

Therefore, it is **ORDERED** that Synergy pay Balakrishnan \$9,035.71 in back wages pay Trimbakkar \$16,420.10 in back wages, and pay the Administrator \$5,000 in civil money penalties. Finally, the Attorney General shall disqualify Synergy for at least two years.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge