In the Matter of:

ADMINISTRATOR WAGE AND HOUR DIVISION,

PROSECUTING PARTY,

v.

PEGASUS CONSULTING GROUP, INC.,

RESPONDENT.

ARB CASE NO. 05-086

ALJ CASE NO. 2004-LCA-021

DATE: April 28, 2009

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Administrator, Wage and Hour Division:
Roger W. Wilkinson, Esq., Paul L. Frieden, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., Gregory F. Jacob, Esq., *United States Department of Labor*, Washington, District of Columbia

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 as H-1B employees. If the Administrator of the United States Department of Labor's Wage and Hour Division determines that an employer has willfully violated the Act's H-1B wage requirements, the Administrator may impose civil money penalties on the

[1] 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2004), as implemented at 20 C.F.R. Part 655, Subparts H and I (2008).

employer. Rajnarayanan Krishnamoorthy, a former H-1B employee with Pegasus Consulting Group, Incorporated, filed a complaint with the Wage and Hour Division contending that Pegasus had violated the INA's H-1B wage requirements. A Department of Labor (DOL) Administrative Law Judge (ALJ) ruled in Krishnamoorthy's favor, awarding him back wages. But the ALJ rejected the Administrator's assessment of civil money penalties, holding that the Administrator failed to establish that Pegasus's INA violations were willful. The Administrator appealed. We reverse the ALJ's decision that the Administrator failed to establish that Pegasus willfully violated the INA's H-1B wage requirements.

REGULATORY FRAMEWORK

The INA permits employers in the United States to hire nonimmigrant alien workers in specialty occupations.[2] These workers commonly are referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the specific specialty.[3] To employ H-1B nonimmigrants, the employer must fill out a Labor Condition Application (LCA).[4] The LCA stipulates the wage levels that the employer guarantees for the H-1B nonimmigrants.[5] After securing DOL certification for the LCA, the employer petitions for and the nonimmigrants receive H-1B visas from the State Department upon Immigration and Naturalization Service (INS) approval.[6]

When a non-immigrant enters into employment, it is a failure to meet the conditions of the LCA for the employer to fail to pay full-time wages to an employee in non-productive status based on lack of work.[7] An employer need not compensate a nonimmigrant, however, if it has effected a "*bona fide* termination" of the employment

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[2] 8 U.S.C.A. § 1101(a)(15)(H)(i)(b).

[3] 8 U.S.C.A. § 1184(i)(1).

[4] 8 U.S.C.A. § 1182(n).

[5] 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 655.732.

[6] 20 C.F.R. § 655.705(a), (b). The INS is now the "U.S. Citizenship and Immigration Services" or "USCIS," which is located within the Department of Homeland Security (DHS). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002).

[7] 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I).

relationship.[8] 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.[9]

The DOL has authority to investigate complaints,[10] require payment of back wages to H-1B nonimmigrants,[11] and impose civil money penalties.[12]

BACKGROUND

Pegasus is a New Jersey based management consulting company that provides computer consulting services to its clients and employs foreign workers in the H-1B visa program.[13] After securing DOL certification for an LCA for Krishnamoorthy, Pegasus received an H-1B visa for him from the INS.[14] Krishnamoorthy arrived in the United States from India and began working for Pegasus in October 1998.[15] Pegasus placed Krishnamoorthy into non-productive status based on lack of work in March and April of 1999, but it continued to pay him his full salary.[16] From May 1999 through September 12, 1999, however, Pegasus stopped paying Krishnamoorthy, but did not notify the INS that it had terminated its employment relationship with him.[17] From September 13, 1999, through July 28, 2000, Krishnamoorthy again worked for Pegasus on new projects and

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[8] 20 C.F.R. § 655.731(c)(7)(ii).

[9] 8 C.F.R. § 214.2(h)(11) (2008).

[10] 8 U.S.C.A. § 1182(n)(2)(A).

[11] 8 U.S.C.A. § 1182(n)(2)(D).

[12] 8 U.S.C.A. § 1182(n)(2)(C); *see also* 20 C.F.R. § 655.700, 810(a)-(b) (under 1995 and 2008 regulations). Because the 1995 regulation at 20 C.F.R. § 655.731(c)(5) (1995), requiring an employer to compensate H-1B workers for non-productive time, was declared invalid on procedural grounds, *Nat'l Assoc. of Mfrs. v. United States Dep't of Labor*, Civ. A. No. 95-0715, 1996 WL 420868 (D.D.C. July 22, 1996), *aff'd and remanded on other grounds*, 159 F.3d 597 (D.C. Cir. 1998), we have applied 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I), which is the same as the invalidated regulation. *See* Brief of the Wage and Hour Administrator in Support of his Petition for Review at 3, n.3.

[13] Hearing Transcript (HT) at 190.

[14] Administrator's Exhibits (AX) 3-4, 16.

[15] HT at 34.

[16] HT at 35-36.

[17] HT at 38-40, 71-72, 76, 216-217, 220, 320-321.

Pegasus paid him at his previous salary rate.[18] Krishnamoorthy resigned his position with Pegasus at the end of July 2000, but Pegasus did not pay him for the work he performed in July 2000.[19] On August 3, 2000, Pegasus notified the INS by letter that it wished to cancel Krishnamoorthy's H-1B visa and by letter dated November 21, 2000, the INS confirmed that Krishnamoorthy's visa had been revoked.[20]

Sometime in 2001, Krishnamoorthy contacted the DOL to complain about the wages Pegasus failed to pay him.[21] After conducting an investigation, the DOL's Wage and Hour Division Administrator issued a February 4, 2004 determination that Pegasus had willfully violated the INA's H-1B wage requirements.[22] Specifically, the Administrator found that Pegasus had willfully failed to pay Krishnamoorthy for the time he was in non-productive status based on lack of work from May 1999 through September 12, 1999, and for the work he actually performed in July 2000. Thus, the Administrator assessed Pegasus for back wages of $24,857.39 and civil money penalties of $5,000. Pegasus 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 10, 2005. Although the ALJ also found that Pegasus failed to properly pay Krishnamoorthy for the time he was in non-productive status from May 1999 through September 12, 1999, and for the work he performed in July 2000, he modified the Administrator's assessment and determined that Pegasus owed Krishnamoorthy $26,500 in back wages.[23] Furthermore, the ALJ rejected the Administrator's assessment of a civil money penalty on the grounds that the Administrator failed to establish that Pegasus's INA violations were willful.

Pegasus filed a timely petition for review, and the Administrator filed a timely cross-appeal.[24] As provided in 20 C.F.R. § 655.845(e), the Administrative Review Board specified the issue which the Administrator raised in his cross-appeal to be reviewed as whether the ALJ properly rejected the Administrator's assessment of a civil money penalty

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18 HT at 43-46, 88, 220.

19 HT at 48-50; Administrative Law Judge's Exhibit (ALJX) 1.

20 AX 13-14.

21 HT at 53-56.

22 AX 15.

23 D. & O. at 17-19.

24 *See* 20 C.F.R. § 655.655.

on the grounds that the Administrator failed to establish that Pegasus's INA violations were willful.[25]

On November 21, 2005, the Board issued an Order Holding Briefing Schedule in Abeyance until the United States District Court for the District of New Jersey issued its decision in *Pegasus Consulting Group v. Admin. Review Bd.*, No. 05-5161, a case involving an investigation of other complaints that Pegasus had violated the INA's H-1B wage requirements with regard to other foreign workers it had employed in the H-1B visa program.[26] The district court issued its decision on March 31, 2008. The limitations

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[25] As provided in 20 C.F.R. § 655.845(e), the Board also specified the following issues, which Pegasus raised in its appeal, to be reviewed:

> 1) Whether the ALJ properly found that Pegasus failed to consummate a bona fide termination of the employment of the H-1B employee, Rajnarayanan Krishnamoorthy, in May 1999 and thus violated the INA by failing to pay wages during a period of employment identified in Krishnamoorthy's labor condition application;
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> 2) If so, did the ALJ properly calculate the wages that Pegasus owes Krishnamoorthy;
>
> 3) Whether the ALJ properly found that Pegasus improperly withheld Krishnamoorthy's wages for the month of July 2000 because Pegasus concluded that under the terms of his employment agreement, Krishnamoorthy failed to give it adequate notice of his intention to leave the company.

See Administrator v. Pegasus Consulting Group, Inc., ARB No. 05-085, ALJ No. 2004-LCA-021 (ARB Nov. 28, 2008).

[26] After receiving complaints from ten other H-1B nonimmigrant workers Pegasus employed, the Administrator investigated Pegasus in another case. Ultimately, an ALJ determined in a Decision and Order issued on November 13, 2002, that Pegasus owed 14 H-1B nonimmigrant workers back wages for time they were in non-productive status in 1999 and was liable for $40,000 in civil money penalties. *See U.S. Dep't of Labor v. Pegasus Consulting Group, Inc.*, ARB Nos. 03-032/033, ALJ No. 2001-LCA-029, slip op. at 1-3 (ARB June 30, 2005)(*Pegasus I*). On appeal to the ARB, the Board held that Pegasus owed 19 H-1B nonimmigrant workers back wages for time they were in non-productive status in 1999 and for work they actually performed. The Board also affirmed the ALJ's decision that Pegasus was liable for $40,000 in civil money penalties for the willful failure to pay wages to eight of the workers. *Pegasus I*, ARB Nos. 03-032/033, slip op. at 4-7, 11.

Pegasus appealed the Board's decision to the United States District Court for the District of New Jersey. The district court affirmed the Board's decision in *Pegasus Consulting Group v. Admin. Review Bd.*, No. 05-5161 (D.N.J. Mar. 31, 2008).

period for filing a timely notice of appeal to the United States Court of Appeals for the Third Circuit expired on May 30, 2008, and neither party notified the Board that an appeal was filed.

Accordingly, on July 9, 2008, the Board issued an Order Establishing Briefing Schedule in ARB Case No. 05-085, under the terms of which Pegasus was to file its initial brief on or before August 11, 2008. Pegasus failed to file an initial brief in response to the Board's order. Accordingly, on September 17, 2008, the Board issued an Order requiring Pegasus to show cause no later than September 26, 2008, why the Board should not dismiss its appeal because it failed to file a brief in accordance with the Board's briefing order of July 9, 2008. The Board has no record of receiving a response to this Order. Nevertheless, because the General Counsel believed that the Board may have received a response, but misplaced it, the Board requested by letter dated November 5, 2008, that Pegasus file a second copy of its response, if any, with the Board and indicate the date on which it was originally filed. Moreover, the Board stated that if it did not receive Pegasus's response by November 14, 2008, it might proceed to dismiss Pegasus's appeal without further notice.

Pegasus did not respond.[27] Thus, the Board held that Pegasus's failure to file an initial brief or to respond to the Board's order to show cause why the Board should not dismiss its appeal because it failed to file a brief constitutes a failure to prosecute its case. The Board dismissed Pegasus's appeal, therefore, because it declined to prosecute it before the Board.[28] Consequently, the disposition of the issues Pegasus raised in its appeal are not before the Board in the instant case, ARB Case No. 05-086.

In the instant case, the ALJ admitted evidence regarding the *Pegasus I* investigation and its disposition "for very limited purposes." D. & O. at 2. The ALJ found "little probative value" in the *Pegasus I* decision "that on its face would suggest that I am bound by the disposition in that case." *Id*. Furthermore, the ALJ found that the conclusions of the ALJ in *Pegasus I* "are not binding on my findings in the instant matter before me, and I find no reason to go beyond the evidence presented relative to the specific charge underlying the instant matter that would support review of the record in" *Pegasus I*. *Id*.

[27] By letter dated December 2, 2008, counsel for Pegasus informed the Board that his firm no longer represents Pegasus in this case and that he understood that Pegasus is no longer in business.

[28] *Administrator v. Pegasus Consulting Group, Inc.*, ARB No. 05-085, ALJ No. 2004-LCA-021 (ARB Nov. 28, 2008).

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's decision.[29] Under the Administrative Procedure Act, the Board, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[30] The Board has plenary power to review an ALJ's factual and legal conclusions de novo.[31]

DISCUSSION

Pegasus committed willful violations of the INA's H-1B wage requirements warranting imposition of civil money penalties

We consider whether Pegasus committed willful violations of the INA's H-1B wage requirements warranting imposition of civil money penalties. The Administrator has the authority to impose civil penalties for a willful failure to comply with the H-1B wage requirements.[32] A "willful failure" to comply is "a knowing failure *or* a reckless disregard with respect to whether the conduct was contrary to" the H-1B wage requirements at 8 U.S.C.A. § 1182(n)(1)(A)(i), (ii), 20 C.F.R. § 655.731, or 20 C.F.R. § 655.732.[33]

The ALJ rejected the Administrator's assessment of a civil money penalty on the grounds that the Administrator failed to establish that Pegasus's INA violations were willful. Initially, the ALJ considered the DOL investigator's testimony that he computed civil money penalties because his investigation of how Pegasus paid Krisnamoorthy was, in fact, a "reinvestigation." The ALJ determined that this testimony was not accurate.[34]

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[29] 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845 (2008) *See* 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).

[30] 5 U.S.C.A. § 557(b) (West 2008).

[31] *Yano Enters., Inc. v. Administrator*, ARB No. 01-050, ALJ No. 2001-LCA-001, slip op. at 3 (ARB Sept. 26, 2001); *Administrator v. Jackson*, ARB No. 00-068, ALJ No. 1999-LCA-004, slip op. at 3 (ARB Apr. 30, 2001).

[32] 8 U.S.C.A. § 1182(n)(2)(C); 20 C.F.R. § 655.810(b) (1995 and 2008 regulations).

[33] 20 C.F.R. § 655.805(b) (1995), 20 C.F.R. § 655.805(c) (2008) (emphasis added); *see McLaughlin v. Richland Shoe Co*., 486 U.S. 128, 133 (1988); *Pegasus I*, ARB Nos. 03-032/033, slip op. at 11.

[34] The DOL investigator testified that he based his determination of Pegasus's willfulness on the fact that H-1B nonimmigrant workers in *Pegasus I* had made

Instead, the ALJ found that the incidents underlying the investigation regarding Krishnamoorthy occurred "contemporaneously" with the incidents that were involved in the Administrator's other investigation in *Pegasus I*. The ALJ concluded, therefore, that she could not find that Pegasus failed to pay Krishnamoorthy despite its knowledge from another investigation that its pay practices were improper.[35]

Further, the ALJ stated that she was not convinced that Pegasus "recklessly" stopped paying Krishnamoorthy in May 1999, because the evidence reflects that "he was advised that there was no work left for him to perform, and was offered a paid ticket to return to India."[36] The ALJ also noted that Pegasus did pay Krishnamoorthy for some period of the time he was in non-productive status, which she found "demonstrates that it recognized its obligation to do so."[37] With respect to the non-payment in July 2000, the ALJ found that Pegasus "relied upon an employment contract as grounds for deducting Krishnamoorthy's pay, which reflects a reasonable interpretation of [its] obligations, and does not demonstrate the level of *recklessness* necessary to support the imposition of a civil money penalty."[38] Thus, the ALJ found that the Administrator failed to meet his burden of establishing that Pegasus's conduct was willful so as to warrant assessment of civil money penalties and dismissed the Administrator's claim for them.

While the ALJ determined that Pegasus did not demonstrate a "reckless" disregard for the INA's H-1B wage requirements, she did not further consider whether its conduct demonstrated a "knowing failure" to comply with the H-1B wage requirements, which is also sufficient, in and of itself, to establish a "willful" failure to comply.[39] The ALJ found that "[t]here is also no doubt that [Pegasus] was familiar with its obligation to pay employees for involuntary nonproductive time," but it nevertheless failed to pay Krishnamoorthy for the time he was in non-productive status from May 1999 through September 12, 1999.[40] The ALJ's finding that Pegasus was familiar with its obligation to pay employees for involuntary nonproductive time is supported by the testimony of

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Krishnamoorthy's complaint and that as the result of that investigation, Pegasus understood that it had to pay employees while they were in nonproductive status. *See* D. & O. at 7; HT at 144.

35 D. & O. at 20.

36 *Id*.

37 *Id*.

38 *Id*. (emphasis added).

39 *See* 20 C.F.R. § 655.805(b) (1995), 20 C.F.R. § 655.805(c) (2008); *McLaughlin v. Richland Shoe Co*., 486 U.S. at 133; *Pegasus I*, ARB Nos. 03-032/033, slip op. at 11.

40 D. & O. at 15, 17.

Pegasus's President and Chief Financial Officer, who both testified that they were "aware" of the H-1B requirements for an employer to pay H-1B nonimmigrant employees for non-productive time.[41] The ALJ found it "significant" that the testimony of Pegasus's President "demonstrates his familiarity with the H-1B visa process, yet the evidence reflects noncompliance with program requirements."[42] Indeed, the ALJ found the fact that Pegasus paid Krishnamoorthy for some period of the time while he was in non-productive status "demonstrates that it recognized its obligation to do so."[43] Therefore, according to the ALJ's own findings, Pegasus knowingly failed to comply with the H-1B wage requirements. A "knowing failure" to comply is a willful violation, and the ALJ erred in not imposing a civil money penalty.

Likewise, the ALJ's findings about Pegasus's failure to pay Krishnamoorthy for his work in July 2000 are inconsistent. On the one hand, she found that Pegasus's reliance on an employment contract as grounds for deducting Krishnamoorthy's pay is "clearly prohibited."[44] On the other hand, she found that Pegasus reasonably relied on the employment contract.[45] We find that failing to pay Krishnamoorthy for work actually performed in July 2000 was also a willful violation of the Act.

CONCLUSION

The ALJ's findings that Pegasus knew of its obligations to comply with the H-1B wage requirements, but it nevertheless failed to do so, are supported by the record and sufficient to establish a "knowing failure" to comply with the H-1B wage requirements and, therefore, a "willful" failure to comply. Consequently, we **REVERSE** the ALJ's finding that the Administrator failed to meet his burden of establishing that Pegasus's conduct was willful so as to warrant assessment of civil money penalties.[46] The Administrator imposed a civil penalty of $5,000.[47] We find this to be a moderate

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41 HT at 217-218, 323.

42 D. & O. at 16.

43 D. & O. at 20.

44 D. & O. at 17-18.

45 D. & O. at 20.

46 As we reverse the ALJ's finding that the Administrator failed to meet his burden of establishing that Pegasus's conduct was willful so as to warrant assessment of civil money penalties on the merits, we need not address the Administrator's alternative argument that we should reverse the ALJ's finding under the principles of collateral estoppel.

47 *See* 20 C.F.R. § 655.810(b); *Pegasus I*, ARB Nos. 03-032/033, slip op. at 11.

exercise of the Administrator's authority under the circumstances and accept that as the total assessment.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge