In the Matter of:

ADMINISTRATOR, WAGE and HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

PROSECUTING PARTY,

v.

THE LAMBENTS GROUP,

and

VENKAT POTINI, PRESIDENT, LAMBENTS GROUP,

RESPONDENTS.

ARB CASE NO. 10-066

ALJ CASE NO. 2008-LCA-036

DATE: November 30, 2011

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party, Administrator, Wage and Hour Division:
Joan Brenner, Esq.; Paul L. Frieden, Esq.; William C. Lesser, Esq.; M. Patricia Smith, Esq.; *U.S. Department of Labor,* Washington, District of Columbia

For the Respondent:
Santosh K. Pawar, Esq.; *Law Firm of Santosh K. Pawar,* Pittsford, New York

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge;* Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge.*

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act, as amended (INA or the Act).[1]

Pursuant to a complaint, the Department of Labor's Wage and Hour Division investigated Lambents Group, Inc., and issued a Determination Letter on July 1, 2008, charging, among other things, that Lambents Group and its president, Venkat Potini, willfully failed to pay wages to ten nonimmigrant employees. Disagreeing with the Administrator's determination, which ordered payment of back wages and assessed civil money penalties, Lambents Group and Potini requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ). In a Decision and Order (D. & O.) issued January 27, 2010, the presiding ALJ held Lambents and Potini individually and jointly liable for the payment of back wages and civil money penalties. Lambents and Potini timely appealed to the Administrative Review Board (ARB or Board). For the reasons stated, we affirm the ALJ's Decision and Order.

BACKGROUND

The INA permits an employer to hire non-immigrant workers in "specialty occupations" to work in the United States for prescribed periods of time.[2] These workers are commonly referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the relevant specialty.[3] An employer seeking to hire an H-1B worker must obtain DOL certification by filing a Labor Condition Application (LCA).[4] The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant.[5] After securing the certification, and upon approval by the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS), the Department of State issues H-1B visas to these workers.[6]

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1 8 U.S.C.A. §§ 1101-1537 (West 1999 & Thomson Reuters Supp. 2011). The INA's implementing regulations are found at 20 C.F.R. Part 655, Subparts H and I (2011).

2 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700.

3 8 U.S.C.A. § 1184(i)(1).

4 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731-733.

5 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 732.

6 20 C.F.R. § 655.705(a), (b).

Lambents is a sponsor of H-1B visa workers who work as information technology consultants for client companies. D. & O. at 6; Hearing Transcript (Tr.) at 49. Lambents, through its president, Potini, filed numerous LCAs with the DOL to secure H-1B visas for non-immigrant workers to work in the field of computer programming. D. & O. at 2.

During the Wage and Hour Division's investigation of the complaint filed in this case, Martin Murray, Wage and Hour's investigator, discovered that Potini's files lacked the requisite documentation supporting the prevailing wages he attested to in the LCAs he prepared. D. & O. at 6. Murray noted that Potini was unable to provide all LCAs or the source of the prevailing wage he used on the applications. *Id.* at 6. Murray testified that Potini did not provide complete payroll records or copies of all LCAs that had been filed. *Id*. Murray testified that he determined that the wage rates were wrong by explaining that Potini had agreed with him that the rate for Level II programmers was the appropriate wage rate for his employees in this case. *Id.* at 10. Murray relied on Potini's agreement as well as on DOL guidelines, documentation supporting the H-1B visa petitions that described the work, telephone conversations with the Respondents' employees, and the position descriptions to determine the appropriate wage rate was Level II. *Id*. at 11. Thus, Murray calculated back wages based upon his conclusion that OES level II programmer/analyst wage rates applied. *Id*.

After completing the Wage and Hour investigation, the Administrator found that Lambents and Potini willfully failed to pay wages as required, willfully misrepresented a material fact on a Labor Condition Application (LCA), substantially failed to provide notice of the LCA filing, failed to make available for public examination the LCA and other documents as required, and failed to comply with the provisions of subpart H or I. Administrator's Determination at 1 (July 1, 2008). The Administrator determined that Lambents and Potini owed a total of $177,918.97 in back wages to the ten employees, and assessed Lambents and Potini $95,400.00 in civil money penalties. *Id.*

Lambents and Potini disagreed with the Administrator's determination and requested a hearing before an ALJ, which took place on February 17, 2009. Pursuant to the resulting Decision and Order, the ALJ found Lambents Group and Potini individually and jointly liable for the payment of back wages and civil penalties, ordered that they pay back wages in the total amount of $185,241.81,[7] and affirmed the Administrator's assessment of civil money penalties in the reduced amount of $72,000. D. & O. at 40.

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[7] The ALJ ordered Lambents and Potini to pay the ten employees in the following amounts as parenthetically noted: Shilpa Komirishetty ($18,008.10), Swarna Latha Dheeravath ($10,797.36), Harshal Doshi ($39,485.78), Venkata Gunna ($21,383.90), Venkatesh Inturi ($13,265.56), Venkateswara Kakula ($20,615.07), Susan Katuri ($15,523.54), Manoij Koduri ($17,356.76), Ramesh Kondru ($15,204.24), and Lavanya Selvaraj ($13,607.50).

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's decision.[8] Under the Administrative Procedure Act, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[9] The ARB has plenary power to review an ALJ's factual and legal conclusions de novo.[10] The ARB reviews an ALJ's determinations on procedural issues, evidentiary rulings, and sanctions under an abuse of discretion standard.[11]

DISCUSSION

Lambents and Potini raise three issues on appeal to challenge the ALJ's Decision and Order, as recognized in the ARB's Notice of Intent to Review (March 25, 2010), including: (1) whether the ALJ properly found that Lambents and Potini underpaid wages for which they were obligated under the H-1B LCAs applicable to the ten non-immigrant employees; (2) if wages are owed, whether the ALJ properly calculated the amount of back wages due each of the employees; and (3) whether the ALJ properly found Lambents and Potini to have willfully failed to pay wages and, if so, whether the ALJ properly assessed civil money penalties. We address these issues in the order in which Lambents and Potini have raised them.

Back Wages

The ALJ found that the Respondents did not keep adequate documentation to support the prevailing wages attested on the LCAs it prepared. D. & O. at 23. Therefore, the ALJ concluded that it would have been appropriate for the Wage and Hour's investigator, Murray, to procure a wage determination under the regulations.[12] *Id.* The ALJ accorded substantial weight to Murray's testimony that he did not exercise that option because Potini agreed that the

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[8] 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845. *See* Secretary's Order No. 1-2010, 75 Fed. Reg. 3,924-25 (Jan. 15, 2010) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

[9] 5 U.S.C.A. § 557(b) (West 1996).

[10] *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).

[11] *See, e.g., Mao v. Nasser*, ARB No. 06-121, ALJ No. 2005-LCA-036, slip op. at 12 (ARB Nov. 26, 2008); *Chelladurai v. Infinite Solutions, Inc.*, ARB No. 03-072, ALJ No. 2003-LCA-004, slip op. at 9 (ARB Apr. 26, 2006).

[12] *See* 20 C.F.R. §§ 655.731(b)(3), (d); 655.840(c).

Respondents should have paid the non-immigrant employees at OES level II. *Id.* The ALJ accorded little weight to Potini's explanations about his beliefs about the wage level and inferred from Potini's testimony that he believed that the employees should be at the OES level II wage rate.[13] *Id.* The ALJ credited Murray's testimony instead, that the Respondents agreed to level II as the appropriate level for purposes of establishing a wage. *Id.* at 25. The ALJ stated that because of the agreed wage determination it was unnecessary for the Administrator to request a wage determination and that the Respondents had no grounds to appeal the agreed determination. *Id.* at 23 n.6. Finally, the ALJ went on to find that the preponderance of the evidence supported a finding of a wage determination based upon OES Level II programmer/analyst. *Id.* at 25.

On appeal, Lambents and Potini argue that the ALJ erred when she: 1) failed to make an independent determination of the applicable wage rate and simply affirmed the Administrator's determination; 2) concluded that the parties could decide the applicable wage level by mutual agreement; 3) ignored that the Administrator did not have complete knowledge and a proper understanding of the requirements of the four skill levels at issue for computer programmer positions; and 4) ignored that the Administrator's determination was based on his own determination that no computer programmer could be skill level I and that he refused to follow the process for determining skill levels. Lambents and Potini also argue that the O*NET job description and requirements and employer's job description establish that the skill levels in this case should be level I, that the Administrator did not have the authority to determine wage level without complying with OES prevailing wage guidance or by arriving at an agreement with the Respondents, and that the ALJ's decision that the Respondents have no grounds to appeal the determination of wage level is erroneous, unconstitutional, and unconscionable. Finally, the Respondents deny ever agreeing to a wage level and state that the Administrator has no documentary evidence of such an agreement.

The enforceable wage obligation for an H-1B employer is the "actual wage" or the "prevailing wage," whichever is greater.[14] "Actual wage" is the wage the employer pays to "all other individuals with similar experience and qualifications for the specific employment in question," but "[w]here no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B non-immigrant."[15] An H-1B employer determines the "prevailing wage" that it lists on the LCA "on the best information available as of the time of filing the application." The employer is not required to use any "specific methodology" but may use "an independent authoritative source, or other legitimate sources of wage data."[16]

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13 *See* 20 C.F.R. § 655.731(d)(2).

14 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731(a).

15 20 C.F.R. § 655.731(a)(1).

16 20 C.F.R. § 655.731(a)(2).

An H-1B employer must have and retain proper documentation in support of its LCA wage attestations.[17] It must have "documentation regarding its determination of the prevailing wage" including "[a] copy of the prevailing wage finding from the [source] for the occupation within the area of intended employment; or [a] copy of the prevailing wage survey for the occupation within the area of intended employment published by an independent authoritative source . . . or [a] copy of the prevailing wage survey or other source data acquired from another legitimate source of wage information that was used to make the prevailing wage determination."[18] The Administrator determines whether an employer has the proper documentation to support its prevailing wage attestation. If the documentation is nonexistent or insufficient, the Administrator may find a violation of paragraph (b)(1), (2), or (3), of § 655.731.[19]

The Administrator may seek an appropriate prevailing wage determination where a complaint alleges failure to pay wages and (1) the employer's documentation is "either nonexistent or is insufficient to determine the prevailing wage," (2) the Administrator "has reason to believe" that the prevailing wage obtained varies substantially from the wage prevailing for the occupation in the area of intended employment, or (3) the employer has been unable to demonstrate that the prevailing wage determined by an alternate criteria is in accordance with the regulatory criteria.[20]

Where an ALJ determines that the Administrator's request for a wage determination was not warranted, the ALJ shall remand the case to the Administrator for further proceedings. "If there is no such determination and remand" by the ALJ, then the ALJ "shall accept as final and accurate" the wage determination obtained. "Under no circumstances shall the [ALJ] determine the validity of the wage determination."[21] An employer may request review of the prevailing wage determination from the issuing agency within thirty days of receiving it.[22]

The regulations do not explicitly address whether an ALJ must accept the Administrator's prevailing wage determinations as final in circumstances where the Administrator has not consulted ETA, but instead has made prevailing wage determinations based on information of record.[23]

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17 20 C.F.R. § 655.731(b)(3).

18 20 C.F.R. § 655.731(b)(3)(iii)(A), (B), or (C).

19 20 C.F.R. § 655.731(d)(1).

20 20 C.F.R. § 655.731(d)(1).

21 20 C.F.R. § 655.840(c).

22 20 C.F.R. § 655.731(d)(2).

23 *See* 20 C.F.R. § 655.840(c).

First of all, the ALJ did not err in not making an independent determination of the applicable wage rate because she is prohibited from doing so by the regulations. As previously noted, the regulations state that "[u]nder no circumstances shall the [ALJ] determine the validity of the wage determination."[24] Therefore, the ALJ properly declined to make an independent wage determination.

Secondly, we agree with the ALJ that the investigator's calculation of the prevailing wage was reasonable under the circumstances presented here. D. & O. at 11, 23. The Administrator has broad discretion under the regulations to "conduct such investigations as may be appropriate" and "gather such information as deemed necessary."[25] In an enforcement action such as this, where the employer failed to maintain adequate documentation to support the wage listed in the LCA, the "Administrator *may* contact [the] E[mployment] T[raining] A[dministration], which shall provide the Administrator with a prevailing wage determination which the Administrator shall use as the basis for determining violations and for computing back wages."[26] Indeed, contrary to Lambents' assertions in its brief, the Administrator's decision to go to ETA for a prevailing wage determination is discretionary under Section 655.731(d)(1), not mandatory.

Where the Administrator does not exercise the option to procure a prevailing wage determination from ETA, the regulations do not expressly set out a framework for the investigator to determine the appropriate wage rate for purposes of calculating back wages. Nonetheless, we think that in this case the Administrator clearly engaged in reasonable efforts to determine back wages due the complainants. A prevailing wage determination can be based on an "independent authoritative source"[27], or "another legitimate source" of wage information.[28] Based on the ALJ's finding that the Administrator relied on "OES Level II data for the geographic area where the employees worked" (D. & O. at 26), this would appear to serve as "an independent authoritative source" as set out in Section 655.731. That authoritative source coupled with other information relied on by the Administrator, *e.g.*, "documentation supporting the H-1B visa petitions that described the work," "telephone conversations with [Respondent's] employees," and the position descriptions (D. & O. at 11) fully support finding that the Administrator's prevailing wage determination for purposes of calculating back pay was reasonable.[29]

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[24] 20 C.F.R. § 655.840(c).

[25] 20 C.F.R. § 655.800(b).

[26] 20 C.F.R. § 655.731(d)(1).

[27] 20 C.F.R. § 655.731(b)(3)(iii)(B).

[28] 20 C.F.R. § 655.731(b)(3)(iii)(C).

[29] In further support of the prevailing wage determination, the ALJ credited Investigator Murray's testimony that Potini "agreed" that the appropriate wage level was OES Level II. D. & O.

1099 payments

Lambents paid the employees with a combination of monthly salary plus a percentage of their billable hours which Lambents recorded as "per diem" payments and for which Lambents recorded the payments with the IRS as 1099 income. Noting that there is no evidence of record to substantiate that the payments identified as "per diem" constituted reimbursement for actual expenses incurred, the ALJ was of the opinion that 1099 income payments should have been treated as wages. Nevertheless, the ALJ held that "the fact that they were not makes them ineligible [for qualification] as cash wages paid pursuant to the prevailing regulations." D. & O. at 26.[30]

Lambents and Potini challenge the ALJ's determination, contending that the ALJ erred when he upheld the Administrator's calculation of the amount of wages as not including credit for 1099 payments he made to the non-immigrant workers. In response, the Administrator argues that the ALJ's determination should be affirmed because the payments made to the non-immigrant employees, as recorded on IRS Form 1099, do not have withholdings and thus do not qualify as wages under the applicable regulations. Deputy Administrator Br. at 24.

An employer is obligated to pay the higher of the prevailing wage or the actual wage.[31] The required wages must be paid "cash in hand, free and clear, when due."[32] "'Cash wages paid' for purposes of satisfying the H-1B required wage shall consist only of those payments that meet all the [] criteria" set forth in 20 C.F.R. § 655.731(c)(2)(i)-(iv). Payments must be shown in the employer's payroll records and disbursed to the employee, less authorized deductions. The employer must report the payments to the Internal Revenue Service as the employee's earnings, with appropriate withholdings for taxes and deductions under the Federal Insurance Contributions Act.[33] The fact that the employees did not submit receipts to Lambents for expenses incurred, and were not required by Lambents to do so, is immaterial. It is the

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at 23, 25. While we generally defer to an ALJ's credibility determination, as a general matter the prevailing wage should not be subject to agreement between an investigator and an employer, particularly when, as here, there is no written record of the agreement. Section 655.731(b)(3) sets out the various ways for documenting the prevailing wage, and it is reasonable for investigators to use such documentation to determine a prevailing wage for purposes of calculating back pay in the context of an enforcement action.

30 *Id.* The ALJ noted that while this result could seem to unjustly enrich employees who receive 1099 payments, the Respondents declined to take advantage of the opportunity to reclassify the payments as wages and take the necessary deductions. *Id.*

31 8 U.S.C.A. § 1182(n)(1)(A)(i); 20 C.F.R. § 655.731(a).

32 20 C.F.R. § 655.731(c).

33 26 U.S.C.A. § 3101, *et seq.* (West 1989 & Supp. 2011); 20 C.F.R. § 655.731(c)(2).

employees' obligation to keep such records for IRS tax purposes, not for submission to their employer, as evidence of expenses incurred that offset treating the "per diem" payments as taxable income. Aside from the fact, as the ALJ recognized, that the 1099 payments that Potini made to his employees and classified as per diem payments do not meet the requirements of wages under the INA regulations, Lambents is to be held to the representation it has in effect made to the IRS through the filing of the 1099s - that the payments made were to cover "per diem" costs for which the employees were not reimbursed. Therefore, the ALJ correctly concluded that Lambents and Potini do not get credit for these payments as wages.[34]

Willful failure to pay required wages

The ALJ found that Lambents and Potini willfully failed to pay the required wages because the "Respondents did not make a good faith effort to file accurate LCAs, despite attesting that the information contained therein was accurate," "made no attempt to correlate the prevailing wage with the occupational and geographical requirements of an appropriate source," and in fact, "randomly selected and reported" the wage determinations they listed. D. & O. at 36-37.

On appeal, Lambents and Potini argue that they did not willfully fail to pay the required wages because they in fact paid the employees their required wages.

We hold that the ALJ properly determined that Lambents' and Potini's failure to pay wages was "willful." A "'willful failure' means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to" the obligation to pay wages under the terms of the LCA.[35] The record shows that Lambents and Potini exercised a "reckless disregard" in relation to their responsibility to identify the appropriate prevailing wage, as the ALJ found. *Id.* at 36. Lambents and Potini knew that they had to identify the prevailing wage on the LCA and pay that wage to their employees, but instead included random numbers on the LCAs and used those arbitrary amounts, which were based on an 80/20 method of payment entirely separate from the requirements for H-1B workers, for payment. *Id.* at 37.

CONCLUSION

For the foregoing reasons, we affirm the ALJ's assessment of back wages owed by Lambents and Potini and assessment of civil money penalties. Accordingly, we affirm the ALJ's order directing Lambents and Potini to pay to each of the ten identified employees from the total $185,247.81 in back wages awarded, the amount specified in the ALJ's Decision and Order that is owed to each plus pre-judgment and post-judgment interest on the specified amount as

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[34] See *Administrator v. Avenue Dental Care*, ARB No. 07-101, ALJ No. 2006-LCA-029, slip op. at 9-10 (ARB Jan. 7, 2010).

[35] 20 C.F.R. § 655.805(c); *see Avenue Dental Care*, ARB No. 07-101, slip op. at 12.

ordered, and further order the immediate payment of the total amount owed. We also affirm the ALJ's order directing the Administrator to make such calculations with respect to wages and interest as may be necessary and appropriate to carry out this Final Decision and Order. Finally, we affirm the ALJ's finding of willful violations and order directing the payment of civil money penalties in the amount of $72,000.

ORDER

The ALJ's Decision and Order is **AFFIRMED**. [36]

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

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[36] A copy of this decision will be sent to the Administrator who will notify the Department of Homeland Security (DHS) that DOL has determined that the Respondents have violated the INA's employee protection provision. *See Talukdar v. U.S. Dept of Veterans Affairs,* ARB No. 04-100, ALJ No. 2002-LCA-025**,** slip op. at 13 n.12 (Jan 31, 2007). This notice will trigger the Respondents' debarment from H-1B non-immigrant hiring for two years. *See* 8 U.S.C.A. § 1182(n)(2)(C)(ii)(II) ("If the Secretary [of Labor] finds . . . a . . . violation of clause (iv) . . . the Attorney General shall not approve petitions filed with respect to that employer . . . during a period of at least 2 years."); see also 20 C.F.R. §§ 655.810(d) ("The Administrator shall notify the DHS . . . that the employer shall be disqualified from approval of any petitions filed by . . . the employer . . . for . . . [a]t least two years for violation(s) of any of the provisions specified in paragraph (b)(2)."); 655.810(b)(2)(iii) ("Discrimination against an employee"), 655.855 ("The Administrator shall notify the DHS and ETA of the final determination of any violation requiring that the DHS not approve petitions filed by an employer."). Neither the ALJ nor the Board has the authority to waive this disqualification sanction. *See Cyberworld Enter. Techs., Inc. d/b/a Tekstrom, Inc. v. Administrator,* ARB No. 04-049, ALJ No. 2003-LCA-017 (ARB May 24, 2006) (noting mandatory nature of disqualification sanction for any covered employer found to have committed listed violations of INA).