In the Matter of:

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

PROSECUTING PARTY,

v.

CAMO TECHNOLOGIES, INC.,

RESPONDENT.

ARB CASE NO. 11-026

ALJ CASE NO. 2010-LCA-023

DATE: August 31, 2012

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

Joan Brenner, Esq.; Paul L. Frieden, Esq.; William C. Lesser, Esq.; Jennifer S. Brand, Esq.; and M. Patricia Smith, *United States Department of Labor*, Washington, District of Columbia

For the Respondent:

William A. Stock, Esq.; *Klasko, Rulon, Stock, & Seltzer, LLP*; Philadelphia, Pennsylvania

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge,* and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act (INA or the Act) and its implementing regulations. 8 U.S.C.A. §§ 1101-1537 (West 1999 & Thompson Reuters Supp. 2011), as implemented at 20 C.F.R. Part 655, Subparts H and I (2012). Following a complaint and ensuing investigation, the Department of Labor's Wage and Hour Division determined that the Respondent, Camo Technologies, Inc. (CTI) had willfully failed to comply with and substantially violated the Act's notice-posting and document-maintenance provisions. Wage and Hour assessed civil money penalties and recommended debarment. CTI requested a hearing. Subsequent to a hearing, a Department of Labor Administrative Law Judge (ALJ) determined that the violations were neither willful nor substantial. Accordingly, the ALJ rejected the civil money penalties assessed and debarment recommended by the Administrator, Wage and Hour Division. The Administrator appealed. We reverse the ALJ's decision.

STATUTORY AND REGULATORY SCHEME

The H-1B non-immigrant worker program is a component of the INA that permits the temporary employment of non-immigrants to fill specialized jobs in the United States. *See* 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1182(n); 20 C.F.R. Part 655, subparts H and I. An employer who seeks to hire a non-immigrant in a specialty occupation must submit a Labor Condition Application (LCA) to the Department of Labor. The LCA sets forth, among other things, the rate of pay, period of employment, occupation, and information relating to the nonimmigrant's work location. If the Labor Department certifies the LCA, the employer files a Petition for a Non-Immigrant Worker with the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS). If USCIS approves the petition, the non-immigrant worker may obtain a visa from the Department of State, allowing him to enter the country and work for a temporary period. *See* 8 U.S.C.A. § 1184(g)(4); 8 C.F.R. §§ 214.2(h)(2)(i)(D), (9)(iii)(A)(1), (13)(iii)(A), (15)(ii)(B).

On or within 30 days before the date the employer files the LCA, the employer must provide notice to "United States workers" of its intent to hire an H-1B worker by providing notice of the impending filing.[1] The employer must provide this notice to the bargaining representative of workers in the occupation in which the H-1B nonimmigrant will be employed. If there is no such bargaining representative, the employer must post such notices in two conspicuous locations for 10 days "at each place of employment where any H-1B nonimmigrant will be employed (whether such place of employment is owned or operated by the employer or by some other person or entity)." The notice must indicate the number of H-1B nonimmigrants sought; the occupational classification; the

[1] A "United States worker" is defined as either, (1) a citizen or national of the United States, or (2) an alien who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under INA section 207, is granted asylum under INA section 208, or is an immigrant otherwise authorized by the INA or the Department of Homeland Security to be employed in the United States. 20 C.F.R. § 655.715.

wages offered; the period of employment; the location(s) at which the H-1B nonimmigrant(s) will be employed, and that the LCA is available for public inspection at the employer's principal place of business in the U.S. or at the worksite. 20 C.F.R. § 655.734; *see also* 8 U.S.C.A. § 1182(n)(1)(C). "Place of employment" is defined as "the worksite or physical location where the work actually is performed by the H-1B . . . nonimmigrant," but the regulation includes several exceptions not applicable in this case. *See* 20 C.F.R. § 655.715 Definitions "Place of employment;" *see also infra* at n.4.

The DOL has authority to investigate complaints,[2] to enforce the H-1B visa program provisions by imposing civil money penalties, and to refer the employer to the Department of Homeland Security for disqualification from participation in the H-1B visa program for a prescribed period of time – a process known as "debarment."[3] Wage and Hour's Administrator may assess civil money penalties of up to $1,000 per violation for notification violations under 20 C.F.R. § 655.734 if they are substantial, or $5,000 per violation for notice violations if the violations are willful. 20 C.F.R. § 655.810(b)(1)(ii), (b)(2).

Pursuant to 20 C.F.R. § 655.805(c), a "willful failure" "means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to sections 212(n)(1)(A)(i) or (ii), or 212(t)(1)(A)(i) or (ii), or §§ 655.731 or 655.732." *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (employer either knew or showed reckless disregard for the matter of whether the statute prohibited its conduct); *see also Trans World Airlines v. Thurston*, 469 U.S. 111 (1985). The relevant regulations do not include a definition of a "substantial violation." The ARB has recognized that an H-1B employer's compliance with the essential requirements of a statute or regulation may show that the employer "had not substantially failed to comply with the rule," and thus an ALJ could reasonably conclude that civil money penalties were not warranted in that case. *Santiglia v. Sun Microsystems, Inc.*, ARB No. 03-076, ALJ No. 2003-LCA-002, slip op. at 9 (ARB July 29, 2005).

BACKGROUND

Notice-Posting History from 2001-2009

The Respondent admitted the essential facts in this case. *See* Joint Exhibit 12 (JX) (Stipulations 1-66.) CTI is an information technology firm located in Woodbridge, New Jersey. CTI contracts with its "few" direct or primary clients to place its H-1B workers with other businesses or secondary clients located throughout the United States. Transcript (T.) at 202-207 (uncontroverted testimony of Nalini Parsram, CTI's vice president of Human Resources and Administration, that CTI "only had a few" direct

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[2] 8 U.S.C.A. § 1182(n)(2)(A); 20 C.F.R. § 655.700, 800.

[3] 8 U.S.C.A. § 1182(n)(2)(C); 20 C.F.R. §§ 655.700(A)(4), 655.810, 655.855.

clients). Before December 2001, CTI operated as Bit Tech, Inc. a/k/a BIT Technologies, Inc. ("BIT Tech"). Stipulations 13, 24, 25. In December 2001, CAMO, Inc. acquired BIT Tech and BIT Tech changed its name to Camo Technologies, Inc., a division of CAMO, Inc. Stipulation 24. Ashwani Jasti founded BIT Tech and then served as the president of CTI. Stipulations 12, 13. Nalini Parsram (or Jasti) was BIT Tech's Business Development Director and then ultimately became CTI's Vice President, Human Resources and Administration. Stipulations 14, 37.

The Respondent further admitted that Wage and Hour Investigator John Warner sent an e-mail to Parsram on October 15, 2001, expressly setting forth the legally mandated LCA notice-posting requirements. Stipulation 20 (the "2001 E-mail"). In the 2001 E-mail, Warner cited to the regulation regarding the notice-posting requirement, namely 20 C.F.R. § 655.734, and indicated that workers, "AT THE PLACE OF EMPLOYMENT" should be able "to easily read or see the notice." *Id*. (emphasis in original). The 2001 E-mail further explained to Parsram that BIT Tech's method of posting at BIT Tech's Woodbridge principal place of business was insufficient. *Id.* Importantly, the 2001 E-mail expressly warned about "civil penalties and other sanctions for substantial failure to post." *Id.*

The Respondent admitted that the Administrator discussed or investigated CTI and/or BIT Tech's notice-posting practices on several occasions after the 2001 E-mail to Parsram and before January 19, 2006. On October 17, 2001, a BIT Tech manager informed Warner that BIT Tech "would henceforth comply with the posting requirements." Stipulation 22. BIT Tech then informed Warner that BIT Tech "posted notice of filing the LCA at 60 third party worksites in 17 states." Stipulation 23. The Respondent admitted that, after BIT Tech became CTI, the Administrator issued a determination letter on June 17, 2002, finding that BIT Tech "failed to post notice of filing of the LCAs at all 60 worksites in 17 states where it placed its H-1B employees, in violation of 20 C.F.R. § 655.734." Stipulation 26. The Respondent admitted that the Administrator "investigated" violations during a "2005 Investigation" that included "CTI's alleged failure to post notice of filing the LCAs at all the work locations." Admittedly, the 2005 Investigation resulted in a "2006 Determination Letter" finding that CTI "failed to provide notice of filings of the LCAs at each worksite where it placed its H-1B employees, in violation of 20 C.F.R. § 655.734." Stipulation 34.

Following the 2001 E-mail and the 2006 Determination Letter, CTI admittedly "did not post an LCA notice or notice of filing and LCA" at 67 locations identified as a "Place of Intended Employment/Worksite Location" for the H-1B nonimmigrant worker in one of 26 states (the "67 Worksites"). Stipulation 55; JX 2; *see e.g.* JX 4. For each of those 67 Worksites, CTI identified the related LCA and stated that the "Dates of Petitioned Employment" would last for approximately one year or more during 2007 through 2012.[4] Stipulation 55; JX 2. CTI assigned the H-1B workers it sponsored in

[4] This admission of year-long or multi-year placements removes the possibility that the 67 Worksites were excluded from the definition of "worksite locations" as troubleshooting computer engineers. Pursuant to the regulatory definition of "place of employment," the

these LCAs, and others, to locations throughout the country, which CTI neither owned nor operated, *and in which these workers spent the majority of their working hours.* The occupational classification designated on the LCAs at issue in this case were for computer programmers, analysts, software engineers and related specialty occupations pertaining to the information technology industry. Stipulations 4, 5, 10.

2010 Investigation

In 2010, Wage and Hour investigated CTI for alleged violations of the Act occurring after its 2006 determination, including the failure to post the requisite notice of LCA filings. Stipulations 29-36. Testifying for CTI, Parsram stated that she informed DOL's investigator that CTI's practice was to place its H-1B workers at worksites owned and controlled by CTI's clients. Parsram explained that, alternatively, CTI's own client(s) would in turn assign CTI's H-1B workers to worksites controlled by that client's client – referred to as an "end-user." Parsram testified that in this latter instance, it is at the end-user's worksite that the H-1B worker "is performing services." T. at 202. Parsram explained that CTI would post notice of the LCA filing at its offices in New Jersey. Where the H-1B worker was to be "placed" at the direct client's worksite, CTI would post notice there after getting permission to post. Where the H-1B worker was to be "placed" by a direct client at a work location controlled by their client or the end-user, Parsram stated that CTI's policy was to ask the direct client to ask its client, the end-user, for permission to post notice at that worksite. Where permission was granted, CTI would provide the H-1B worker with a copy of the relevant LCA and direct that worker to post the LCA in a conspicuous place at that worksite when the worker was first required to report for work there. Where the direct client or the end-user denied permission to post, CTI would instruct its H-1B workers to report to that worksite anyway. T. at 182-84, 186; *see* Stipulations 42-48. CTI developed forms for the posting process and documented its success or failure to post notice. *Id.*; Stipulations 49-53. During the period relevant to this case, CTI failed to post notice in connection with 67 LCAs. Stipulations 49-53, 56-59; *see* JX 2.

In connection with the 2009 investigation, Parsram testified that she had no concerns about producing documents detailing CTI's notice-posting practices to DOL's investigator because she "really thought we were compliant." T. at 186. Parsram added, however, that CTI changed its notice-posting practice in April 2010 to mandate notice-posting "at the end client location if we have to have our consultants working there, our employees," and she ensures compliance herself. T. at 183-88, 202-05.

Following the investigation, Wage and Hour issued a Determination Letter on May 7, 2010. It assessed civil money penalties in the amount of $192,625 and proposed an at least 2-year debarment for what it determined to be CTI's "willful failure" to meet,

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meaning of "worksites" of "place of employment" excludes locations to which troubleshooting computer engineers go for a short time period, but expressly includes computer engineers sent to a location for "weeks or months at a time." *See* 20 C.F.R. § 655.715(1)(ii)(C)(2), (3).

and "substantial violation" of, the notice-posting requirement at 20 C.F.R. § 655.734.[5] JX 1, 11. CTI objected to the Determination and requested a hearing. After a September 8, 2008 hearing, the ALJ found that CTI's failure to comply with the notice-posting requirement was not "willful" and the violation was not "substantial." The ALJ assessed no civil money penalty and held that debarment was inappropriate; the ALJ determined that the Administrator had failed to consider all factors in assessing civil money penalties. The Administrator appeals, asserting "willful failure" or, alternatively, "a substantial violation" to comply with the notice-posting requirement. The Administrator urges the Board to reverse the ALJ's decision and uphold the Administrator's May 7, 2010 determination assessing civil money penalties and recommending that CTI be debarred. CTI seeks affirmance and any other just relief.[6]

As provided in 20 C.F.R. § 655.845(e), the Board specified the following issues for review in its February 10, 2011 Notice of Intent to Review:

> (1) Did the ALJ properly find that the Respondent did not willfully violate the H-1B provisions when it failed to provide notice of the Labor Condition Applications (LCAs) as required by 20 C.F.R. § 655.734?
> (2) Did the ALJ properly find that the Respondent's failure to post notice of the LCA filings for workers at third-party worksites was not substantial?
> (3) Did the ALJ err by refusing to award civil money penalties against and to debar the Respondent for the notice violations?

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's decision.[7] Under the Administrative Procedure Act, the ARB, as the Secretary of Labor's designee,

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[5] The May 7, 2010 Determination of the Administrator, Wage and Hour Division, reflects that CTI would be debarred from participation in the H-1B visa program "for a period of at least two years," consistent with the statutory provisions at 8 U.S.C.A. §§ 1154, 1184(c). JX 1 at 2. Before us, the Acting Administrator, Wage and Hour Division, indicates that the Administrator recommended that CTI "be debarred for two years." Acting Administrator's Brief at 3.

[6] We accept CTI's motion for leave to file its Surreply and consider it herein.

[7] 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845. *See* Secretary's Order No. 1-2010, 75 Fed. Reg. 3924-25 (Jan. 15, 2010) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[8] The Board reviews an ALJ's legal conclusions under the INA de novo.[9]

DISCUSSION

CTI committed a willful violation of the INA's H-1B notice-posting requirement, warranting imposition of civil money penalties and referral for debarment

We consider the Administrator's argument that the ALJ erred in finding that CTI did not commit a willful violation of the INA's H-1B notice-posting requirement warranting civil money penalties and debarment. The ALJ acknowledged that it is uncontroverted that CTI did not post notice of the filing of the LCAs "at the actual location where non-immigrants worked." The ALJ added that CTI "does not deny awareness of the posting requirements, and the record establishes that Respondent made attempts to facilitate posting at the work site of the H-1B workers." Decision and Order at 18. The ALJ initially found that while CTI had "actual knowledge of its obligation to post at all locations" where its H-1B workers worked, the evidence failed to establish that CTI "knowingly and intentionally violated the posting requirement." *Id.* at 19. Specifically, the ALJ found that CTI showed "good faith" and, (1) posted notices in its main offices; (2) developed a system, after the 2005 investigation, to document its "attempts to post LCAs with third party end users of non-immigrants who were contracted out by Respondent's direct customers;"[10] and (3) posted at several sites out of its control. *Id.* at 19-21.

Stated simply, the ALJ's ultimate conclusions squarely contradict the *stipulated* facts in this case. First, CTI admitted that it did not post a notice at the 67 Worksites identified as "Places of Intended Employment." CTI sent its H-1B workers to work at these 67 Worksites irrespective of whether or not its attempt to meet the notice-posting requirement was successful. CTI admitted that the intended period of employment was one year or more at these 67 Worksites, which means that the 67 Worksites clearly satisfied the definition of a "place of employment." *See* 20 C.F.R. § 655.715(1)(ii)(C)(3). CTI admitted that a Wage and Hour investigator sent an e-mail to Parsram explicitly explaining that posting must be done at the place of employment, posting at the Woodbridge headquarters was insufficient, and that civil penalties could be imposed for violations of the posting requirement. Parsram was CTI's only witness at the hearing. CTI admitted to numerous instances where the Administrator raised concerns about

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[8] 5 U.S.C.A. § 557(b) (West 1996).

[9] *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).

[10] CTI was required to post notice of the filing of the LCAs not to post the LCAs.

CTI's posting practices being insufficient, including a 2006 Determination Letter finding that CTI violated the notice-posting requirements of 20 C.F.R. § 655.734. CTI's admissions established that it violated the posting requirements 67 times from 2006 through 2009 and that Wage and Hour repeatedly notified it over several years of its deficient posting before 2006. Consequently, these admissions establish as a matter of law that from 2006 through 2009, CTI willfully violated the posting requirements of 8 U.S.C.A. § 1182(n)(1) and 20 C.F.R. § 655.734. *See Administrator v. Pegasus Consulting Group, Inc.*, ARB No. 05-086, ALJ No. 2004-LCA-021, slip op. at 7 (ARB Apr. 28, 2009).

Further, we note that the purpose of the notice-posting requirement is the protection of U.S. workers from displacement by H-1B non-immigrant workers. 65 Fed. Reg. 80110 (Dec. 20, 2000). The notice-posting requirement *precedes* the filing of the LCA and *precedes* the placement of an H-1B nonimmigrant worker – necessarily where its purpose is to prevent displacement of U.S. workers. While the type/character of violation informs the remedy, the Administrator notes that "the importance of the posting of notice requirement may be gauged by the fact that the regulations contain no exception to such requirement" even where, such as here, the employer had to have its client post the notice. Statement of the Acting Administrator at 17 quoting 65 Fed. Reg. 80110 (Dec. 20, 2000); *see also* 20 C.F.R. § 655.734(a)(1)(ii)(A)(regulation requires posting "at each place of employment where any H-1B nonimmigrant will be employed (whether such place of employment is owned or operated by the employer or by some other person or entity)").[11] On the facts of this case, we hold that CTI's failure to comply was knowing and therefore willful, sufficient to support the imposition of remedies as assessed by the Administrator. In short, a "knowing failure" to comply is a willful failure to comply, and the ALJ erred in not finding a willful violation of the Act warranting imposing civil money penalties.[12] *Pegasus*, ARB No. 05-086.

Based on the foregoing, we reverse the ALJ's finding that the Administrator did not establish a willful violation of the Act's notice-posting requirement. Therefore, we uphold as reasonable the Administrator's assessment of $192,625 in civil money penalties and refer this case for CTI's debarment. 8 U.S.C.A. §§ 1154,1184(c); 20 C.F.R. § 655.810(d), 655.855(b)(4); *see Administrator, Wage & Hour Division v. The Lambents Grp.*, ARB No. 10-066, ALJ No. 2008-LCA-036, slip op. at 8 n.36 (ARB Nov. 30, 2011).

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[11] In limited situations not relevant to this case, the regulations allow the employer to post the H-1B notice after filing the corresponding LCA. "Where an employer places any H-1B nonimmigrant(s) at one or more worksites not contemplated at the time of filing the application, but which are within the area of intended employment listed on the LCA, the employer is required to post electronic or hard-copy notice(s) at such worksite(s), in the manner described in paragraph (a)(1) of this section, on or before the date any H-1B nonimmigrant begins work." 20 C.F.R. § 655.734(a)(2).

[12] Because we find a willful failure to comply with the notice-posting requirement, we do not reach the issue of whether CTI committed a substantial violation of that requirement.

CONCLUSION

We **REVERSE** the ALJ's conclusion that the Acting Administrator failed to meet her burden to establish that CTI willfully violated the INA's H-1B notice-posting requirement warranting civil money penalties and debarment. We **AFFIRM** the Administrator's assessment of civil money penalties and refer the case for CTI's debarment.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge