



In the Matter of:

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

ARB CASE NO. 12-076

ALJ CASE NO. 2011-LCA-016

PROSECUTING PARTY,

DATE: July 16, 2014

v.

XCEL SOLUTIONS CORPORATION,

and

**JIT GOEL, President, individually, and
RENU GOEL, Vice President, individually,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Paul L. Frieden, Esq.; and Mary J. Rieser, Esq.; *U.S. Department of Labor, Office of the Solicitor; Washington, District of Columbia*

For the Respondents:

Patrick Papalia, Esq. and Kimberly A. Capadona, Esq.; *Archer & Greiner, P.C.; Hackensack, New Jersey*

BEFORE: Luis A. Corchado, *Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*.

FINAL DECISION AND ORDER

This case arises under the H-1B provisions of the Immigration and Nationality Act, as amended (INA).¹ Several former H-1B nonimmigrant employees of the Respondents, XCEL Solutions Corporation, and its officers (XCEL), Jit and Renu Goel (the Goels), filed complaints with the Department of Labor's Wage and Hour Division. They alleged that XCEL violated the INA's H-1B provisions when it failed to pay them the wages it agreed to pay under various Labor Condition Applications (LCA) during non-productive periods that XCEL caused (benching time).

The Administrator of the Department of Labor's Wage and Hour Division (Administrator) investigated the complaints and determined that XCEL violated the INA's H-1B provisions by (1) willfully failing to pay required wages to eighteen of its H-1B nonimmigrant employees during nonproductive periods of employment, (2) willfully violated the Act's LCA notice-posting and secondary displacement inquiry requirements, and (3) failed to cooperate in the investigation. The Administrator assessed back wages and civil money penalties, recommended debarment, and held XCEL and the Goels liable. XCEL and the Goels requested a hearing. After a hearing, a Department of Labor Administrative Law Judge (ALJ) modified some of the Administrator's back wage determination but otherwise affirmed the Administrator's determination. XCEL and the Goels appealed to the Board. We affirm the ALJ's decision.

BACKGROUND²

XCEL Solutions Corporation is an information technology consulting company in New Jersey that places software consultants with clients in the United States.³ XCEL either places its consultants directly with clients or uses other staffing companies as intermediaries to place its consultants.⁴ Jit Goel is the President of XCEL, his wife, Renu Goel, is the Vice President of XCEL, and both are XCEL's sole shareholders.⁵ XCEL leased several properties from the Goels to use as guest houses for XCEL's H-1B nonimmigrant employees, and XCEL leases its office

¹ 8 U.S.C.A. §§ 1101-1537 (Thomson Reuters 2014), as implemented by 20 C.F.R. Part 655, Subparts H and I (2013). "H-1B" refers to the nonimmigrant class described in 8 U.S.C.A. § 1101(a)(15)(H)(i)(b).

² For the factual background, we rely on the Administrator's findings and reasonable inferences from those findings as well as undisputed facts.

³ Administrator's Exhibits (AX) 9, 29; Hearing Transcript (HT) at 127, 197, 303-304, 422.

⁴ HT at 468-469.

⁵ ALJ's Decision and Order (D. & O.) at 22-23.

from a corporation that Jit Goel wholly owns.⁶ In 2007, XCEL opened an office in the Philippines with funds from Jit Goel's personal bank account.⁷

As the result of a previous investigation of XCEL, the Administrator determined on December 3, 2007, that XCEL failed to pay five of its H-1B nonimmigrant employees their required wages during productive work and nonproductive periods and that XCEL violated the INA's LCA notice-posting requirement, assessing \$47,039.09 in back wages against XCEL.⁸ The Administrator ordered XCEL to comply with the wage requirements at 20 C.F.R. § 655.731 and the LCA notice-posting requirements at 20 C.F.R. § 655.734 "in the future."⁹ Following the Administrator's 2007 investigation, a Wage and Hour Division investigator met with Jit Goel and informed him of H-1B statutory and regulatory wage requirements and LCA notice-posting requirements. Jit Goel agreed to future compliance.¹⁰

Subsequently, by letter dated October 28, 2009, the Administrator notified XCEL that it would again conduct an investigation after receiving complaints from several of XCEL's former H-1B nonimmigrant employees alleging XCEL failed to pay them their required wage during nonproductive periods.¹¹ The investigation initially covered the period from July 1, 2007, to September 30, 2009, but was expanded to include the period from February 9, 2007, to April 30, 2010.¹² On February 4, 2011, the Administrator determined that XCEL violated the INA's H-1B provisions by (1) failing to pay eighteen of its H-1B nonimmigrant employees their required wages for both productive work and nonproductive time, (2) failing to post notice of filing of LCAs and to make required displacement inquiries of secondary employers, and (3) failing to cooperate in the investigation.¹³ The Administrator assessed \$228,045.39 in back wages and \$72,450.00 in civil money penalties, plus interest, against XCEL and the Goels as individuals, and proposed at least a two-year debarment. The Administrator later amended the assessment of back wages owed to the eighteen employees to \$255,094.52.¹⁴ XCEL timely objected and requested a hearing before an ALJ.¹⁵

⁶ *Id.* at 23.

⁷ *Id.*

⁸ D. & O. at 21, 38; AX 3.

⁹ *Id.*; see 20 C.F.R. § 655.805(a)(2), (5).

¹⁰ D. & O. at 21, 38; HT at 378-382, 610-611.

¹¹ D. & O. at 2; AX 8, 21a-g.

¹² D. & O. at 2, 21; AX 8-9.

¹³ D. & O. at 2; AX 1.

¹⁴ D. & O. at 21; AX 17a-c.

¹⁵ D. & O. at 2; AX 2.

After a three-day evidentiary hearing in May 2011, the ALJ ultimately affirmed all of the Administrator's determinations, except for a few modifications to the back wage amount. More specifically, the ALJ awarded a total of \$261,042.92 in back wages to eighteen employees: (1) \$253,888.92 to sixteen employees pursuant to her D. & O.; and (2) \$7,154 to two additional employees pursuant to her Amended Decision and Order ("Amended D. & O.").¹⁶ XCEL and the Goels timely appealed the ALJ's decision to the Administrative Review Board (ARB).

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's decision, but neither the statute nor the regulations provide a standard of review.¹⁷ Nevertheless, we will defer to the ALJ's findings of facts that are reasonable from the record. The Board has plenary power to review an ALJ's legal conclusions de novo, including whether a party has failed to prove a required element as a matter of law.¹⁸

STATUTORY AND REGULATORY FRAMEWORK

The INA permits employers to temporarily hire non-immigrants in specialty occupations (generally requiring a four-year degree).¹⁹ 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 for non-immigrant employees they want to hire and guarantee specified prevailing wages and working conditions among other things.²⁰ After securing the LCA, and upon approval by

¹⁶ The ALJ awarded a total of \$261,042.92 in back wages as split among the following eighteen former XCEL H-1B nonimmigrant employees: Christopher Anabo (\$19,724.85), Gabriela Andre (\$14,354.56), Maria Bautista (\$23,525.05), Remar Cuyugan (\$6,351.84), Olalekan Fabode (\$7,891.68), Valeria Fuentes (\$14,757.12), Orlando Geronimo (\$7,014.16), Mary Ann Knaik (\$17,943.20), Joseph Layo (\$20,465.00), Maria Katarina Lopez (\$10,765.92), Jay Maranan (\$23,706.02), Christopher Munez (\$7,666.64), Rogelio Nantes (\$33,297.00), Noel Rodriguez (\$33,577.58), Johnny Ruiz (\$6,333.67), Alberto Tingson (\$6,514.63), Benedicto Maralit (\$5,056.72), and Pawan Singh (\$2,097.28). D. & O. at 25-37, 42-43; Amended D. & O. at 2.

¹⁷ 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845; *see* Secretary's Order No. 02-2012, 77 Fed. Reg. 69,378 (Nov. 16, 2012) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

¹⁸ *Limanseto v. Ganze & Co.*, ARB No. 11-068, ALJ No. 2007-LCA-005, slip op. at 3 (ARB June 6, 2013).

¹⁹ *See* 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1182(n); 20 C.F.R. Part 655, subparts H and I.

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

the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS), the Department of State issues H-1B visas to these workers.²¹

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. 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 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.²² "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.²³ In addition, the INA requires that an employer who places an H-1B nonimmigrant worker with a secondary employer inquire of that secondary employer and determine that the H-1B nonimmigrant employee would not displace United States workers.²⁴ An employer who places an H-1B nonimmigrant worker with a secondary employer must document the means it used to make its secondary non-displacement inquiry.²⁵

An employer must pay an H-1B employee the prevailing wage listed on the employee's LCA starting on the date the employee "enters into employment" with the employer."²⁶ An H-1B employee "enters into employment," when he/she first makes him/herself available for work or otherwise comes under the control of the employer."²⁷ Pursuant to the INA²⁸ and 20 C.F.R. § 655.731(c)(7), the H-1B employer's obligation to pay wages continues except during some, but not all, types of non-productive periods. Subsection 655.731(c)(7)(i) provides, in relevant part, that the H-1B employer must pay wages:

²¹ 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); 20 C.F.R. § 655.705(a), (b).

²² 20 C.F.R. § 655.734; *see also* 8 U.S.C.A. § 1182(n)(1)(C).

²³ See 20 C.F.R. § 655.715 Definitions "Place of employment."

²⁴ 8 U.S.C.A. § 1182(n)(1)(E)-(G); 20 C.F.R. §§ 655.738(d), 655.805(a)(8).

²⁵ 20 C.F.R. § 655.738(e)(2).

²⁶ 20 C.F.R. § 655.731(c)(6).

²⁷ 20 C.F.R. § 655.731(c)(6)(i).

²⁸ 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I), (IV).

If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (e.g., because of lack of assigned work), lack of a permit or license, or any other reason except as specified in paragraph (c)(7)(ii) of this section

Conversely, pursuant to subsection 655.731(c)(7)(ii), an H-1B employer need not pay wages:

If an H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (e.g., touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant)

These provisions clarify that an employer violates the Act if it fails to pay the LCA-specified wages during periods of the H-1B nonimmigrant's nonproductive status not covered under subsection 655.731(c)(7)(ii). Thus, if an employee reports as available to work, whether it is for orientation or training, the employer violates the Act if it does not pay the H-1B employee his LCA-specified wages.

The DOL has authority to investigate complaints,²⁹ 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.”³⁰ 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.³¹ A “willful failure” means an employer's “knowing failure or a reckless disregard” of its obligations under Sections 8 U.S.C.A. § 1182(n)(1)(A)(i) or (ii), or 8 U.S.C.A. § 1182(t)(1)(A)(i) or (ii), or 20 C.F.R. §§ 655.731 or 655.732.³²

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

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

³¹ 20 C.F.R. § 655.810(b)(1)(ii), (b)(2).

³² 20 C.F.R. § 655.805(c) citing *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).

DISCUSSION

A. *XCEL's Arguments Regarding the ALJ's Back Wage Determinations*

In appealing the back wage awards, XCEL contends generally that the record does not support the ALJ's back wage assessments. For the most part, XCEL makes vague challenges to the ALJ's fact findings and back wage calculations, but does not assert any specific legal challenges against the ALJ's determinations. XCEL argues that the ALJ: 1) failed to account for the H-1B nonimmigrant employees' voluntary leaves of absence; 2) failed to account for paychecks some of the employees received as satisfying the wage requirements; 3) failed to account for the alleged failure of some of the employees to abide by the terms of their contracts, which XCEL argues absolved it of its wage obligations under the INA; 4) erred in awarding back wages to some employees for bench periods that occurred outside the scope of the period the Administrator's investigation covered; and 5) erred in awarding back wages to some employees for bench periods where there is no evidence in the record indicating that the employees were ever available to work for XCEL or reported to XCEL for work. Below, we address each argument in order. Finally, XCEL argues that the INA does not authorize the imposition of interest on back wage assessments and that the record does not support any justification to pierce the corporate veil to hold Jit and Renu Goel personally liable for the assessed back wages and civil money penalties.

The ALJ found that the XCEL H-1B nonimmigrant employees were properly paid their contract salaries while on a work project with a client. But the ALJ further found that the XCEL H-1B nonimmigrant employees, who testified, indicated that while XCEL required each employee to report to XCEL's office or be available to take phone calls from clients during their nonproductive bench periods, XCEL only paid each employee a per diem payment of thirty dollars per day, with no taxes withheld, when they were benched and did not otherwise have a work project with a client. Because tax was not withheld, the ALJ made a reasonable fact finding that the per diem payments were payments for living expenses and not wages in this case and, therefore, she did not offset them against the wages owed.³³

1) XCEL argues that the ALJ failed to account for some of the H-1B nonimmigrant employees' voluntary leaves of absence during bench periods, when he assessed back wages.³⁴ While XCEL challenges the ALJ's factual findings, we will not overturn the ALJ's reasonable

³³ D. & O. at 26. See 20 C.F.R. § 655.731(c)(2)(iii) (to satisfy the required wage obligation, the payment of wages must indicate the payments of the tax reported and paid to the IRS). "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; must be disbursed to the employee, less authorized deductions; and the employer must report the payments to the IRS as the employee's earnings, with appropriate withholdings for taxes. 20 C.F.R. § 655.731(c)(2)(i)-(iv).

³⁴ Respondents' Brief In Support of Petition for Review (R. Brief) at 14-15; see also R. Brief at 2 (regarding H-1B nonimmigrant employee Anabo), 3-4 (Andre), 4 (Bautista), 9 (Layo), 11 (Nantes), 12 (Rodriguez), 13 (Tingson).

fact findings simply because XCEL disagrees. The ALJ reasonably credited the consistent testimony of XCEL's H-1B nonimmigrant employees that XCEL instructed the employees to take unpaid leave for some of the bench periods at issue, or face termination, over the contrary testimony of the Goels as it was "self-serving and inconsistent with the documentary evidence" and the employees' testimony.³⁵ Based on the employees' testimony, the ALJ found that the H-1B non-immigrant employees' unpaid, nonproductive status during their alleged leaves of absence was involuntary and "due to a decision by the employer" under 20 C.F.R. § 655.731(c)(7)(i).³⁶ Consequently, we reject XCEL's contention and affirm the ALJ's findings as they are reasonable and supported by persuasive and substantial evidence.³⁷

2) We also reject XCEL's argument that the ALJ fail to account for paychecks that some of XCEL's H-1B nonimmigrant employees received as satisfying the wage requirements.³⁸ First, XCEL submitted the paychecks cited to with the appendix filed along with its brief on appeal,

³⁵ D. & O. at 27 (regarding H-1B nonimmigrant employee Anabo), 28 (Andre), 29 (Bautista), 30 (Fuentes), 31 (Layo), 34 (Nantes), 36 (Rodriguez). The ALJ found XCEL H-1B nonimmigrant employee Anabo to be a "credible witness based on his demeanor" and on the consistency between his "testimony" that XCEL instructed its H-1B nonimmigrant employees to take unpaid leave for some of the bench periods at issue or face termination and the similar testimony of the other H-1B employee witnesses. D. & O. at 27. While XCEL accurately notes that Anabo did not testify at the hearing, Anabo did submit a sworn declaration under oath that is consistent with the similar testimony of the other H-1B employee witnesses at the hearing. Thus, the ALJ's determination that XCEL instructed the H-1B employees to take unpaid leave for some of the bench periods at issue or face termination was not based on Anabo's statement alone, but on the consistency of all of the H-1B employees' statements, whether provided in their hearing testimony or in their sworn declarations. Consequently, any error the ALJ made in characterizing Anabo's statement as "testimony" and reference to his "demeanor" is harmless.

³⁶ D. & O. at 27.

³⁷ XCEL also argues that the ALJ failed to account for the actual voluntary sick or vacation leave some XCEL H-1B nonimmigrant employees took during their bench periods when calculating the back wages those employees were owed for those periods. *See* R. Brief at 4 (regarding H-1B nonimmigrant employee Bautista's testimony, HT at 203); R. Brief at 7 (regarding Knaik's declaration, AX 49). As we previously noted, XCEL only provided its H-1B nonimmigrant employees per diem payments and not their required wages during their bench periods. But H-1B nonimmigrants are entitled to benefits such as paid vacations, stock options, and holidays that are provided to the employer's U.S. workers. *See* 20 C. F. R. §§ 655.731(c)(3), (c)(7)(ii). So whether an H-1B employee may have taken voluntary sick or vacation leave does not necessarily establish that they nevertheless are not entitled to the required wages they are owed during such bench periods. Thus, because XCEL has not presented any evidence that it paid the required wages to those H-1B nonimmigrant employees who took actual voluntary sick or vacation leave during their bench periods or pointed to any resolved facts to sufficiently show the ALJ committed any reversible error in her calculations of the back wages they were owed, we reject XCEL's contention.

³⁸ R. Brief at 4 (regarding H-1B nonimmigrant employee Andre), 5 (Bautista), 8 (Layo), 10 (Maralit), 11 (Munez), 11-12 (Nantes), 12 (Rodriguez). 14 (Tingson).

but they are not contained in the record. XCEL has not presented a sufficient basis upon which we should consider this new evidence.³⁹ In any event, the checks applied to pay periods that included both nonproductive and productive days of employment. XCEL has failed to sufficiently demonstrate from the ALJ's findings or undisputed facts that the paychecks satisfied any of the nonproductive days for which the ALJ awarded back wages. Consequently, we infer that the ALJ only awarded back wages for periods when the H-1B employees were benched. Citing to *Adm'r, Wage & Hour Div. v. Wings Digital Corp.*, ARB No. 05-090, ALJ No. 2004-LCA-030 (ARB July 22, 2005), XCEL also argues that each pay period must be viewed separately when determining back wages owed.⁴⁰ Without deciding the merits of this argument, we reject it because XCEL did not sufficiently demonstrate what error and injury it suffered from the ALJ's alleged failure to look at each pay period separately.

3) Next, XCEL argues that some of its H-1B nonimmigrant employees did not comply with the terms of their contracts, thereby absolving XCEL of its wage obligations under the INA for those employees.⁴¹ In adjudicating an H-1B nonimmigrant employee complaint, the ALJ and Board have only the authority expressly or implicitly provided by law.⁴² But as the ALJ determined, *see D. & O.* at 31, 35-36; XCEL failed to point to any legal authority empowering the Administrator or the DOL to consider and resolve alleged breaches of a private contract as potential offsets to XCEL's wage obligations under the INA.

4) XCEL also argues that the ALJ erred in awarding back wages to two XCEL H-1B nonimmigrant employees (Orlando Geronimo and Joseph Layo) for bench periods which occurred outside the scope of the Administrator's stated investigation period (February 9, 2007, to April 30, 2010).⁴³ XCEL baldly asserts that a small portion of the Administrator's award is

³⁹ *See Hoffman v. Nextera Energy, Inc.*, ARB No. 12-062, ALJ No. 2010-ERA-011, slip op. at 13 (ARB Dec. 17, 2013) (When deciding whether to consider new evidence, the Board relies upon the standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, at 29 C.F.R. § 18.54(c), which Respondents have not met here).

⁴⁰ R. Brief at 15.

⁴¹ *Id.* at 6 (regarding H-1B nonimmigrant employee Fuentes), 7 (Geronimo), 12 (Rodriguez), 13 (Ruiz).

⁴² *See, e.g., Wonsock v. Merit Sys. Prot. Bd.*, 296 Fed. Appx. 48, 50 (Fed. Cir. 2008) (Federal Circuit Court agreed with the Merit Systems Protection Board that the administrative law judge had no jurisdiction to review the Office of Personnel Management's discretionary decision pertaining to benefit rules).

⁴³ R. Brief at 15; *see also* R. Brief at 7 (regarding H-1B nonimmigrant employee Geronimo), 9 (Layo). The ALJ awarded XCEL's H-1B nonimmigrant employee Geronimo back wages dating from January 24, 2007, *see D. & O.* at 30-31, and employee Layo dating from 2006, *see D. & O.* at 31-32. *See, e.g., Adm'r, Wage & Hour Div. v. Greater Mo. Med. Pro-Care Providers, Inc.*, ARB No. 12-015, ALJ No. 2008-LCA-026, slip op. at 16 (ARB Jan. 29, 2014)(if a complainant files a timely claim for back pay, the complainant "is entitled to back pay for the entire period of his H-1B

time-barred without citing any legal authority for its argument. We reject XCEL's argument, given its failure to cite to any legal authority for a time-limitation defense.

5) In stating the "relevant facts," XCEL argues that the ALJ erred in awarding back wages to some of its H-1B nonimmigrant employees for periods during which some employees allegedly failed to show they were available to work for XCEL or reported to XCEL for work.⁴⁴ Again, XCEL presents no legal argument or authority for this point. As we recently explained, after an H-1B nonimmigrant employee enters employment, the employer has the burden of proving that it is not obligated to pay the amounts required by the approved LCA.⁴⁵ In addition, the ALJ reasonably relied on the evidence of per diem payments during the bench periods as evidence of availability.⁴⁶ For these reasons, we reject XCEL's contention. Having rejected XCEL's challenges to the ALJ's backpay awards, we affirm the ALJ's award of \$261,042.92.⁴⁷

B. *XCEL's Arguments Regarding the Civil Money Penalties*

Like its appeal of the back wage awards, XCEL also appeals the ALJ's award of a civil money penalty (not the amount) on the general grounds that the record does not show that XCEL willfully violated the INA. In one sentence, XCEL challenged the penalty for failing to pay back wages by saying that its briefing showed that "no back wages are owed." Our preceding discussion demonstrates that we disagree, and we reject this argument. With respect to the issue of "willful failure," the ALJ cited ample reasons for finding a "willful failure." For example, the ALJ noted that XCEL's president, Jit Goel, acknowledged being informed during the Administrator's previous 2007 investigation that XCEL owed back wages to some of its H-1B nonimmigrant employees at that time because its bench period payment policies violated the H-1B wage requirements, *see* HT at 606-614, 619, 625, but XCEL nevertheless continued to use the same bench period policies as determined in the current investigation.

The only other argument XCEL raised in its opening brief regarding the imposition of a penalty was to the posting requirements. An H-1B employee's LCA must be available for public

employment," because the H-1B employer "continued to violate the Act by not paying [the complainant] right up until, and after, he filed [the] complaint alleging non-payment.").

⁴⁴ R. Brief at 5-6 (regarding H-1B nonimmigrant employee Cuyogan), 6 (Fabode), 8 (Layo), 9 (Lopez), 10 (Maranan), 10-11 (Munez), 9-10 (Maralit).

⁴⁵ *See, e.g., Gupta v. Compunnel Software Group, Inc.*, ARB No. 12-049, ALJ No. 2011-LCA-045, slip op. at 15-18 (ARB May 29, 2014)(discussing employer's burden of proof pertaining to nonproductive time periods).

⁴⁶ *See* D. & O. at 29 (citing AX 23b regarding H-1B nonimmigrant employee Cuyogan), 30 (citing AX 23c regarding Fabode), 31 (citing HT at 174 regarding Layo), 32 (citing AX 15 and 22d regarding Lopez), 33 (citing AX 15 regarding Maranan), 34 (citing AX 23e regarding Munez); Amended D. & O. at 2 (citing AX 22e regarding Maralit).

⁴⁷ See note 16 for the amounts specifically awarded each employee.

inspection at all worksites at which an employer places an H-1B employee “whether the place of employment is owned or operated by the employer or by some other person or entity.”⁴⁸ A civil money penalty of up to \$1,000.00 per violation may be assessed for each “substantial” violation of the notification requirement,⁴⁹ and \$5,000.00 for each “willful” violation.⁵⁰ XCEL argues that it should not be held responsible for the fact that its vendors failed to cooperate with XCEL and post the LCA notices it provided to them for posting.⁵¹

But the ALJ noted that XCEL’s president Jit Goel testified that while XCEL provided its vendors with LCA posting verification forms that were to be distributed to the end clients who employed XCEL’s H-1B employees to complete and return to XCEL, HT at 628; *see* AX 66, XCEL never verified whether the vendors distributed the verification forms, as Goel testified that XCEL never received a completed verification form, HT at 628-630, and he “did not wish” to check whether the verification forms were ever actually distributed, HT at 630. In addition, because the ALJ noted that Jit Goel admitted that XCEL was put on notice of the posting requirements during the Administrator’s prior 2007 investigation, HT at 625, the ALJ found that XCEL willfully violated the posting requirements because she found that Goel’s testimony “evinces a conscious decision . . . to ignore whether the LCAs were posted at end client locations despite being notified of the posting requirements.” The ALJ found the Administrator’s assessment of \$3,750 based upon a single LCA notice-posting violation, as the total number of posting violations was unknown, was reasonable given Goel’s testimony establishing XCEL’s practice of placing employees at end client locations without first ensuring that the LCA would be posted.⁵² We affirm the ALJ.

C. *XCEL’s Arguments Regarding the ALJ’s Imposition of Interest on the Back Wage Determinations*

Because the INA does not specifically provide for an award of interest on back pay, XCEL argues that the ALJ had no legal basis for awarding prejudgment and post judgment interest.⁵³ We have previously ruled that the intent of a back pay award is to make the employee

⁴⁸ 20 C.F.R. § 655.734(a)(1)(ii)(A).

⁴⁹ 20 C.F.R. § 655.810(b)(1)(ii).

⁵⁰ 20 C.F.R. § 655.810(b)(2)(i).

⁵¹ R. Brief at 17. XCEL raised additional arguments in its rebuttal brief not raised in its opening brief, and we deem those arguments waived. In addition, we rely on the ALJ’s findings, reasons, and bases for the remaining issues related to the penalties.

⁵² D. & O. at 39.

⁵³ R. Brief at 17-18; *see* D. & O. at 40.

whole, which logically requires the payment of interest.⁵⁴ XCEL did not challenge the amount of the award, and so we do not address that issue.

D. XCEL's Arguments Regarding the ALJ's Decision to Pierce the Corporate Veil

XCEL argues that, as the only entity listed as the H-1B employer on the LCAs of the H-1B nonimmigrant employees at issue in this case and that filed the LCAs, XCEL is the only liable party in this case. In addition, XCEL argues that there is no evidence of fraud or any other necessary elements in the record that could provide a basis to pierce the corporate veil to hold Jit and Renu Goel personally liable for the assessed back wages and civil money penalties.⁵⁵

The ALJ applied the precedent of the United States Court of Appeals for the Third Circuit (within whose jurisdiction this case arises) in *U.S. v. Pisani*, 646 F.2d 83 (3d Cir. 1981) (citing *DeWitt Truck Brokers v. W. Ray Flemming Fruit Co.*, 540 F.2d 681 (4th Cir. 1976)), that a court may hold corporate shareholders personally liable where they have ignored corporate formalities and the situation presents an element of “injustice” or “fundamental unfairness.”⁵⁶ In *Pisani*, the Third Circuit held that in a case involving a federal statute, federal, rather than state law, controlled the issue.⁵⁷

The ALJ applied the factors that the Third Circuit considered in determining whether to pierce the corporate veil as set forth in *Pisani* (including undercapitalization, non-payment of dividends, insolvency, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders).⁵⁸ The ALJ noted that XCEL observed no corporate formalities, whereas the Goels are XCEL's sole shareholders and corporate officers who received hundreds of thousands of dollars in loans and rents from XCEL, but could produce no documentation of those transactions, and intermingled corporate and personal assets.⁵⁹ Because the Goels compromised XCEL's ability

⁵⁴ See, e.g., *Doyle v. Hydro Nuclear Serv.*, ARB Nos. 99-041, 99-042, 00-012; ALJ No. 1989-ERA-022, slip op. at 16 (ARB May 17, 2000), a case arising under the Energy Reorganization Act (ERA) of 1974, 42 U.S.C.A. § 5851 (West 1993), which also does not specifically authorize an award of interest on back pay. In *Doyle*, the Board held that a “back pay award is owed to an individual who, if he had received the pay over the years, could have invested in instruments on which he would have earned compound interest.” *Id.*

⁵⁵ R. Brief at 18-20.

⁵⁶ D. & O. at 41.

⁵⁷ 646 F. 2d at 86; see *United States v. Bestfoods*, 524 U.S. 51, 55, 63 n.9, 64 (1998) (leaving open the question whether state or federal common law applies to pierce corporate veil in case involving federal statute).

⁵⁸ 646 F.2d at 88.

⁵⁹ D. & O. at 42.

to comply with the H-1B wage requirement laws, the ALJ determined that justice and fundamental fairness required that the Goels also be held personally liable for the back wages and civil money penalties the Administrator assessed.⁶⁰

We recognize that, in previous cases, we have affirmed the Administrator's efforts to pierce the corporate veil. For example, in *USDOL v. Kutty*, ARB No. 03-022, ALJ Nos. 2001-LCA-010 to 025, slip op. at 17-19 (ARB May 31, 2005), the Board affirmed holding the owner of corporations also personally liable under the INA for the assessed back wages and civil money penalties, because the corporations had, in the ALJ's words, "no mind, will, or existence of their own" and the owner's "domination" was used to perpetuate violations of the INA. However, the record does not make clear whether this issue is ripe at this stage rather than during an enforcement stage where the DOL would seek to enforce the payment obligation against the Goels. To the extent that we can decide this issue now, we agree with the ALJ's findings and conclusions that Jit Goel and Renu Goel, the president and vice president of XCEL and its sole shareholders, disregarded the corporate formalities to a degree that justifies the Administrator's disregard of the corporate veil and proceeding against them personally for the back wages and civil money penalties assessed in this matter.

CONCLUSION

Based on the foregoing, we **AFFIRM** (1) the ALJ's award of back wages, with prejudgment compound interest due on the back wages and postjudgment interest due on the back wages until paid or otherwise satisfied; (2) the ALJ's assessment of civil money penalties; and (3) the ALJ's holding that Jit and Renu Goel are personally liable for the assessed back wages and civil money penalties. Furthermore, we refer this case for XCEL's debarment.⁶¹

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

⁶⁰ *Id.*

⁶¹ 8 U.S.C.A. §§ 1154, 1184(c); 20 C.F.R. § 655.810(d), 655.855(b)(4); *see Administrator, Wage & Hour Div. v. The Lambents Grp.*, ARB No. 10-066, ALJ No. 2008-LCA-036, slip op. at 8 n.36 (ARB Nov. 30, 2011).