In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,	**ARB CASE NO. 12-102**
	ALJ CASE NO. 2011-LCA-001
PROSECUTING PARTY,	**DATE: January 28, 2015**

v.

SIRSAI, INC.,

and

VIJAY GUNTURU,

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 Sarah Kay Marcus, Esq.; *United States Department of Labor, Office of Solicitor,* Washington, District of Columbia

For Respondent Sirsai, Inc.:
Brian S. Green, Esq.; *Murthy Law Firm*, Owings Mills, Maryland

For Respondent Vijay Gunturu:
Diane M. Butler, Esq.; *Lane Powell PC,* Seattle, Washington

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief 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), 8 U.S.C.A. §§ 1101-1537 (Thomson Reuters 2014), and implementing regulations, 20 C.F.R. Part 655, Subparts H and I (2014). On July 27, 2012, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) affirming the Wage and Hour Division's (WHD's) determination that Respondents Sirsai, Inc. and Vijay Gunturu violated the INA. Respondents petitioned the Administrative Review Board (ARB) for review. We summarily affirm.

BACKGROUND

Sirsai, Inc. (Sirsai) is an information technology consulting company that employs H-1B workers. Vijay Gunturu is Sirsai's President and sole owner. Sirsai and Gunturu completed Labor Condition Applications (LCAs) and applied for H-1B visas on behalf of workers from India. In 2009, a Sirsai employee complained to WHD that Sirsai failed to pay him for productive and non-productive periods as required by the INA. Following an investigation, WHD issued a Notice of Determination (Determination) on September 23, 2010, that Respondents violated the INA. D. & O. at 2. WHD determined, among other violations, that Respondents owed back wages totaling $983,039.12 to 122 H-1B employees. WHD assessed civil money penalties against Respondents in the amount of $405,175, and recommended debarment from the H-1B program for two years.

Respondents requested a hearing on the Determination. After a three-day hearing, the ALJ issued a D. & O. affirming the Determination, and modifying the monetary penalties.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's decision. 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). Where the statute and regulations provide no expressed standard of review, as in H-1B appeals, we defer to the ALJ's fact findings if they are reasonable, and we make reasonable inferences permitted by the ALJ's findings and/or the undisputed record. *Administrator, Wage & Hour Div. v. XCEL Solutions Corp.*, ARB No. 12-076, ALJ No. 2011-LCA-016, slip op. at 2, 4 (ARB July 16, 2014). The ARB 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. *Limanseto v. Ganze & Co.*, ARB No. 11-068, ALJ No. 2007-LCA-005, slip op. at 3 (ARB June 6, 2013).

DISCUSSION

The H-1B program allows a limited number of temporary nonimmigrants to enter the United States to fill jobs in specialty occupations. The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified in part at 8 U.S.C.A. § 1101(a)(15)(H)(i)(b)). An employer seeking to hire an employee on an H-1B visa must satisfy certain administrative and regulatory requirements, such as submitting an LCA to the Department of Labor for each employee and guaranteeing specified wages and working conditions. *See, e.g., XCEL Solutions Corp.*, ARB No. 12-076, slip op. at 4-7.

The Department of Labor is authorized to investigate complaints, to enforce the H-1B visa program provisions by imposing civil money penalties, and to refer an 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."[1] WHD'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.[2] 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), 8 U.S.C.A. §§ 1182(t)(1)(A)(i) or (ii), or 20 C.F.R. §§ 655.731 or 655.732.[3]

This case is particularly egregious. WHD thoroughly investigated Sirsai and discovered hundreds of H-1B violations. WHD cited Sirsai for (1) misrepresenting material facts; (2) willfully failing to pay wages as required; (3) substantially failing to provide notice of the filing of LCAs; and (4) failing to make required displacement inquiries. D. & O. at 18. The ALJ correctly found "the Administrator's determination of the failure to pay wages as willful appropriate" based on ample record evidence. *Id*. at 41.

Respondents argue (Respondents' Brief Re Issues for Review at 1-5) that WHD provided it with insufficient notice of the extent of the violations that WHD was investigating. This contention is not supported in the record. *See* D. & O. at 22-23. The ALJ correctly stated that "Respondents were provided sufficient notice of the claims brought by the Administrator, and there was no prejudicial effect of altering the time frame of the covered period on the WH-56." *Id*. at 23. Further, the record fully supports the ALJ's determination that various employees were misclassified and not paid proper wages. The D. & O. contains a thorough consideration of the factors necessary to establish each employee's proper classification as well as several tables identifying the affected employees and information relevant to their classification. *Id*. at 23-37.

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[1] 8 U.S.C.A. § 1182(n)(2)(C); 20 C.F.R. §§ 655.700(A)(4), 655.810, 655.855.

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

[3] 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).

The record also supports the ALJ's determination that Respondents violated the INA by "benching"[4] employees, and that WHD used a proper procedure for calculating the amounts owed to workers who were benched. *Id*. at 37-39. The ALJ correctly determined that Respondents failed to reimburse employees for business expenses in violation of the INA. *Id*. at 39.

The record also supports the ALJ's determination that Respondents misrepresented material facts on LCAs regarding prevailing wages and employees' work locations, D. & O. at 41-42, and failed to comply with the posting requirement, *Id*. at 43.

Finally, the ALJ reasonably concluded that Respondents' actions were willful, the assessed civil money penalties were appropriate, and that Respondents should be debarred from the H-1B program for a two-year period. *Id*. at 39-41, 44-45.[5]

CONCLUSION

For the foregoing reasons, the ALJ's Decision and Order is **SUMMARILY AFFIRMED.**

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

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[4] Benching an H-1B nonimmigrant refers to "placing him in nonproductive status without pay due to a decision by the employer (e.g., because of lack of assigned work)," and is a violation of the INA and its implementing regulations. *See, e.g.*, *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 2 (ARB Mar. 30, 2007) (citing 20 C.F.R. § 655.731(c)(7)(i) and 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I)).

[5] The ALJ ordered WHD to recalculate the total amounts assessed against Respondents in light of his ruling. D. & O. at 46. On August 29, 2012, WHD submitted to the ALJ an "Administrator's Computations Consistent with the [ALJ's] Decision and Order." Respondents do not challenge the revisions to the calculations.