

In the Matter of:

NITHYA VINAYAGAM,

ARB CASE NO. 15-045

PROSECUTING PARTY,

ALJ CASE NO. 2013-LCA-029

DATE: February 14, 2017

v.

**CRONOUS SOLUTIONS, INC.,
SWAPNA PASHAM,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

Kyle Todd, Esq.; *Law Offices of Kyle Todd*, Los Angeles, California

For the Respondent:

Matthew D. Crawford, Esq.; *Martenson, Hasbrouck & Simon LLP*; Atlanta, Georgia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Administrative Appeals Judge*; and Leonard J. Howie, *Administrative Appeals Judge*. Judge Brown, concurring.

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act of 1990 (INA), as amended by the American Competitiveness and Workforce Improvement Act of 1998.¹ Of particular relevance to this case is 8 U.S.C.A. § 1182(n), which permits nonimmigrants to work in the United States temporarily on what are known as H-1B visas.² Nithya Vinayagam, who entered the United States as a nonimmigrant H-1B worker by petition of Respondent Cronous Solutions,

¹ 8 U.S.C.A. §§ 1101-1537 (Thomson Reuters 2017), as implemented by 20 C.F.R. Part 655, Subparts H and I (2016).

² 8 U.S.C.A. § 1182(n); 20 C.F.R. §§ 655.700-655.855.

Inc., appeals a Labor Department Administrative Law Judge (ALJ) grant of summary judgment in favor of Cronous. The ALJ ruled that Cronous ended its obligation to pay Vinayagam's wages by terminating her employment and informing the Department of Homeland Security's United States Citizen and Immigration Services (USCIS) of the termination, notwithstanding not having paid her return transportation costs to India. The ALJ found that under controlling precedent, non-payment of such costs was not "fatal" to Cronous's motion where its supporting evidence was sufficient to show that Vinayagam, of her own volition, did not return to India but remains in the United States "without a valid visa."³ The ALJ determined that the documents submitted on summary judgment that include Vinayagam's deposition testimony and admissions that Cronous elicited, "show no triable issue of fact." The ALJ concluded that Cronous was not liable for paying wages after its January 2009 notice to USCIS and dismissed Vinayagam's claim that she was entitled to post-discharge wages continuing to the end of the originally approved period of employment.⁴ Because the Administrative Review Board (ARB or Board) concludes that the evidentiary record supports a ruling of summary decision in Cronous's favor under controlling law, the Board affirms the ALJ's Order Granting Summary Decision.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to hear appeals concerning questions of law or fact from final decisions of ALJs in cases arising under the Immigration and Nationality Act's H-1B provisions.⁵ The Board has plenary power to review an ALJ's legal conclusions de novo.⁶ The Board reviews an ALJ's grant of summary decision de novo and under the same standard that governs the ALJ.⁷ Under the regulations governing the entry of summary judgment by an ALJ, applicable to the ARB upon review of an ALJ's summary decision, summary judgment may be entered "for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."⁸ The moving party carries the initial burden of

³ *Vinayagam v. Cronous Solutions, Inc.*, ALJ No. 2013-LCA-029, slip op. at 3-6, 8-11 (Mar. 27, 2015)(Order).

⁴ *Id.* at 3, 5, 11.

⁵ *See* 20 C.F.R. § 655.845; *see also* Secretary of Labor Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,377; 69,378 (Nov. 16, 2012).

⁶ *Limanseto v. Ganze & Co.*, ARB No. 11-068, ALJ No. 2011-LCA-005, slip op. at 3 (ARB June 6, 2013).

⁷ *Alexander v. Atlas Air, Inc.*, ARB No. 12-030, ALJ No. 2011-AIR-003, slip op. at 3 (ARB Sept. 27, 2012).

⁸ 29 C.F.R. § 18.40(d); *see also* 29 C.F.R. § 18.72(a) (2015) (in new, post-2015 rule, noting that the ALJ "shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law").

demonstrating an absence of evidence to support the nonmoving party's case.⁹ A "party opposing the motion may not rest upon . . . mere allegations or denials."¹⁰ Rather, the nonmoving party "must set forth specific facts showing that there is a genuine issue of fact for the hearing."¹¹ To defeat a summary judgment motion, there must be "sufficient evidence favoring the nonmoving party" for the ALJ to return a verdict for that party.¹² Because we review the ALJ's grant of summary decision under the same standards that govern the ALJ, we must affirm an ALJ's grant of summary decision if there is no genuine issue as to any material fact and it is determined that the moving party is entitled to summary decision as a matter of law.¹³

BACKGROUND

1. Governing Law

In signing and filing a Labor Condition Application with the Labor Department, an employer attests that for the entire period of authorized employment it will pay the required wage to the H-1B nonimmigrant worker. 8 U.S.C.A. § 1182(n)(1)(A); 20 C.F.R. § 655.731(a). The Department of Labor's regulation at 20 C.F.R. § 655.731(c)(7)(ii) details circumstances where wages need not be paid, including when the H-1B nonimmigrant worker experiences a period of nonproductive status due to conditions unrelated to his/her employment, or "if there has been a bona fide termination of the employment relationship. [Department of Homeland Security] regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11))^[14], and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E))^[15]." 20 C.F.R. § 655.731(c)(7)(ii).

⁹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

¹⁰ 29 C.F.R. § 18.40(c).

¹¹ *Id.*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

¹² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

¹³ 29 C.F.R. § 18.40(d); *see also* 29 C.F.R. § 18.72(a) (2015).

¹⁴ Under 8 C.F.R. § 214.2(h)(11)(i)(A), the employer, who no longer employs the H-1B worker must "send a letter" to USCIS explaining the change to the "terms and conditions" of the H-1B nonimmigrant employee's employment. Under 8 C.F.R. § 214.2(h)(11)(ii) (2009), USCIS's prior approval of the I-129 petition is automatically revoked if the employer files a written withdrawal of its previously filed I-129 petition. The regulation at 8 C.F.R. § 214.2(h)(11)(ii) was changed effective January 17, 2009. 73 Fed. Reg. 76,891; 76,914 (Dec. 18, 2008); *id.* at 76,892 (noting that change takes effect on January 17, 2009). This change is not relevant to this case and does not affect our disposition of it.

¹⁵ 8 C.F.R. § 214.2(h)(4)(iii)(E) provides:

2. Factual Background¹⁶

In March 2007 Cronous¹⁷ filed a Form I-129 Petition for a Nonimmigrant Worker (which, along with other documents, constitutes an “H-1B petition”) with USCIS on behalf of Vinayagam, a citizen of India. As part of the statutory process, Cronous had filed a Labor Condition Application (LCA) with the Labor Department in which it represented that it would employ Vinayagam as a Programmer Analyst for three years, from October 1, 2007, to September 28, 2010, at an annual salary of \$52,000.00. Respondent’s Exhibit D. Following the Labor Department’s approval of the LCA, USCIS approved Cronous’s H-1B petition on May 13, 2007. Respondent’s Exhibits C, E.

Following her arrival from India, Vinayagam reported for work with Cronous in February 2008. Cronous arranged job interviews for Vinayagam, placing her in June 2008 as a contract worker with another company for approximately three months until Cronous’s contract with the company expired. Cronous paid Vinayagam for the three months she worked for the other company. Cronous did not pay her for the period before she worked for the other company. Nor did Cronous pay her after her employment with that company ended, as Cronous failed to place Vinayagam with other companies.

In January 2009, Cronous’s Kowsala Rajendra called Vinayagam and told her that Cronous was shutting down its operations that month; that Vinayagam’s employment was terminated as of January 2009; and that she should leave the country immediately. Respondent’s Exhibit F, Complainant’s Response To Request For Admissions, Set One (Dec. 3, 2014); Respondent’s Exhibit A, Deposition of Nithya Vinayagam (Nov. 25, 2014) at 14, 24, 27. Vinayagam testified on deposition that she responded to Rajendra by telling her that Cronous needed to pay her all the salary it owed her and provide her with “a termination notice and a one-

Liability for transportation costs. The employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to section 214(c)(5) of the Act. If the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition, the alien has not been dismissed. If the beneficiary believes that the employer has not complied with this provision, the beneficiary shall advise the Service Center which adjudicated the petition in writing. The complaint will be retained in the file relating to the petition. Within the context of this paragraph, the term ‘abroad’ refers to the alien's last place of foreign residence. This provision applies to any employer whose offer of employment became the basis for an alien obtaining or continuing H-1B status.

¹⁶ The Factual Background statement is based upon the undisputed evidence of record before the ALJ on summary judgment, in the absence of an evidentiary hearing.

¹⁷ At all times relevant to this action, Cronous was a Delaware corporation with its principal place of business in Georgia. Cronous is now apparently dissolved. Respondent’s Exhibit B.

way airfare to India.” According to Vinayagam, Rajendra replied that she would check with management “about that salary and airfare to India.” *Id.* at 24-26.

Vinayagam testified that a few days after her telephone conversation with Rajendra, Vinayagam spoke to several recently-hired H-1B nonimmigrant Cronous employees who told her that they had just come from India and that Cronous was not actually shutting down its operations. Vinayagam testified that she then thought that Rajendra’s statement that Cronous was shutting down operations was “just a scare tactic;” that her employment had not been terminated because she believed that Cronous had to follow certain procedures to discharge her, including “[g]iving a termination notice [and] paying one-way airfare” “but [n]one of this happened.” Vinayagam did not receive any other calls from any Cronous officer or employee. *Id.* at 25-28, 39.¹⁸

On January 15, 2009, Cronous sent a letter to USCIS asking that it revoke its approval of the I-129 petition. Complainant’s Exhibit D, Respondent’s Exhibit G. On March 17, 2009, USCIS wrote a letter to Cronous acknowledging its request and indicating, “Therefore, the approval of your petition is automatically revoked in accordance with 8 C.F.R. § 214.2(h)(11)(ii).” Complainant’s Exhibit E, Respondent’s Exhibit H. Cronous continued to pay Vinayagam her wages; the last being February wages paid in March 2009. Complainant’s Exhibit B, Respondent’s Exhibit M.

Vinayagam testified on deposition that when Cronous fired her in January 2009, she did not take any step to arrange to leave the United States and did not contact any immigration authority about her status. Vinayagam acknowledges USCIS’s revocation of her status as an H-1B nonimmigrant employee of Cronous. Respondent’s Exhibit F Complainant’s Response To Request For Admissions, Set One (Dec. 3, 2014). She learned of the 2009 revocation of her H-1B status in 2012 when USCIS issued a “Request for Evidence” inquiry to a prospective employer who, she asserts, unsuccessfully applied in 2012 to employ her under the H-1B visa program. Respondent’s Exhibit A, Deposition of Nithya Vinayagam (Nov. 25, 2014) at 27.

Vinayagam also testified that before the September 28, 2010 end of the originally authorized period of employment, she filed, on September 19, 2010, an application for a B-2 visitor visa that was denied because, she stated, she was in the United States without funds to support herself. Vinayagam detailed her unsuccessful efforts to regain employment under the H-1B visa program and admitted that despite knowing that she is out of status, she did not file any application with USCIS or any government agency seeking permission or authority to remain in the United States and that she remains in the U.S. without a visa. *Id.* at 31-45.

In May 2009, Vinayagam filed a complaint with the Labor Department alleging, among other things, underpayment of wages. Respondent’s Exhibit K. Vinayagam also filed suit against Cronous in the United States District Court of Georgia pertaining to her employment in

¹⁸ Vinayagam testified, however, that she did receive in April or May of 2009, a “legal notice” from a lawyer for Cronous for breach of contract in which “they threatened me to leave the country immediately.” Vinayagam agreed that nothing in the letter indicated that she was still a Cronous employee; she did not return to India but continued her efforts to procure other H-1B employment. Respondent’s Exhibit A, Deposition of Nithya Vinayagam (Nov. 25, 2014) at 39-43.

the H-1B program. Respondent's Exhibit I. On August 2, 2011, the parties settled that case. The settlement provided for a \$45,000 payment to Vinayagam and indicated that it "does not extend to claims which Plaintiff could only bring with the U.S. Department of Labor." Respondent's Exhibit J Settlement Agreement and Mutual Release at 2. Vinayagam asserts, and Cronous does not dispute, that the settlement covered back wages from February 1, 2008, to February 28, 2009, and return home travel costs. Before the ARB, Vinayagam's only claim is that Cronous's wage obligation continued from March 1, 2009, to the September 28, 2010 end of the originally authorized period of employment because Cronous did not offer or provide payment of return transportation costs upon discharging her.

On June 17, 2013, the Labor Department's Wage and Hour Division (WHD) determined, after an investigation covering June 1, 2008, to May 1, 2009, that Cronous owed \$24,166.65 in back wages for the period from February 2008 to November 2008 but had paid this assessment in full by virtue of its \$45,000 settlement payment. Respondent's Exhibit L; *see also* WHD's Debra Brown letter to Cronous (June 24, 2013). Vinayagam requested a hearing before an ALJ, seeking payment for wages from March 1, 2009, through September 28, 2010.¹⁹ Respondent's Exhibit M.

Prior to the scheduled hearing, the ALJ granted Cronous's motion for summary decision based on his determination that there is no triable issue as to further wage liability. Specifically, the ALJ determined that the evidence demonstrates: (1) that on or around January 2009, Cronous told Vinayagam that she was fired and needed to leave the country immediately; (2) that Cronous asked USCIS by letter dated January 15, 2009, from its president, Swapna Pasham, to revoke the approval of its I-129 petition; (3) that the fact that Cronous did not provide return transportation costs was not fatal to its motion where Vinayagam did not return to India but remains in the United States without a valid visa; (4) that Vinayagam was not entitled to wages past Cronous's January 2009 notice to USCIS, and (5) that Vinayagam had been fully compensated by wages Cronous paid her through February 28, 2009, and by a 2011 settlement for \$45,000 covering wages through February 28, 2009, as confirmed by the Wage and Hour Division's determination that Cronous had, by settlement, already paid a \$24,166.65 back wage assessment for 2008 and had no further liability. The ALJ thus dismissed Vinayagam's claim that Cronous's liability to pay wages continued to the September 28, 2010 end of the originally-authorized period of employment. Lastly, the ALJ found no evidence of abuse of the corporate form and thus no basis for holding Swapna Pasham personally liable for any damages. Order at 6-7.

¹⁹ Vinayagam did not ask the ALJ and does not ask the Board to award return transportation costs. She concedes that \$45,000 settlement payment included the cost of her return to her home country. Complainant's Pre-Trial Statement (June 2, 2014) at 3 n.1; Complainant's Brief on Appeal, at 4.

DISCUSSION

In *Amtel Group of Fla., Inc. v. Yongmahapakorn*,²⁰ the ARB held that an employer must meet three requirements to effect a bona fide termination under 20 C.F.R. § 655.731(c)(7)(ii) and end its obligation to pay wages: (1) expressly terminate the employment relationship with the H-1B nonimmigrant worker; (2) notify USCIS of the termination so that USCIS can revoke its prior approval of the employer's H-1B petition under 8 C.F.R. § 214.2(h)(11); and (3) provide the H-1B nonimmigrant worker with payment for transportation home under certain circumstances as provided in 8 C.F.R. § 214.2(h)(4)(iii)(E).

It is undisputed that Cronous met the first two requirements articulated in *Amtel* by informing Vinayagam that her employment was terminated and by informing USCIS that it no longer employed her. As to the third, Cronous has submitted uncontroverted evidence in support of its motion for summary decision sufficient to prove that it was under no obligation to provide payment of return transportation costs or offer to do so because Vinayagam stayed in the United States on her own volition, unsuccessfully applying for H-1B employment and a tourist visa. As we detail below, the ALJ properly found that the evidence demonstrates no triable issue of fact and thus dismissed Vinayagam's claim that because Cronous did not pay or offer to pay return transportation costs its obligation to pay her wages continued to the September 2010 end of her (original) authorized period of employment.

The fact of an H-1B employer's nonpayment of return transportation costs to a discharged H-1B nonimmigrant employee is not dispositive in all cases of the issue of whether or not the employer has established a bona fide termination of the employment relationship, thereby ending its liability to pay the employee's wages. The ARB has construed the requirement of 20 C.F.R. § 655.731(c)(7)(ii) that the H-1B employer provide payment of return transportation costs to a fired H-1B employee under certain circumstances, to mean that the employer has the burden on the question of whether it had a duty to provide such payment and whether it satisfied that requirement.²¹

In some cases, the ARB has ruled that the employer met the requirement by proving voluntary actions on the part of the H-1B employee upon discharge and notice to USCIS that absolved the H-1B employer of liability for continuing to pay wages notwithstanding the obligation imposed upon the employer by 20 C.F.R. § 655.731(c)(7)(ii) to pay the employee's return transportation costs. For example, in *Puri v. University of Ala. Huntsville*,²² the ARB held that the employer effected a bona fide termination of the employment relationship and thus was not liable for continued wage payments notwithstanding not having, at the time of termination, either provided or offered to provide the employee with payment for transportation home. The Board reasoned that payment for transportation home was not required because the employer

²⁰ ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 11 (ARB Sept. 29, 2006).

²¹ *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 6 (ARB Mar. 30, 2007).

²² ARB No. 13-022, ALJ Nos. 2008-LCA-038, -043; 2012-LCA-010 (ARB Sept. 17, 2014).

knew, prior to terminating the H-1B employee's employment that he had married a United States citizen. The marriage made the employee eligible for a change in immigration status and served as a basis for his decision not to return home upon termination of his employment. The Board held in *Batyrbekov v. Barclay's Capital*,²³ that the definition of a bona fide termination of the employment relationship espoused in *Amtel* cannot be strictly applied to cases where it ignores the significance of employer's proof demonstrating that the fired employee remained in the United States of his own volition because a new prospective H-1B employer had filed an H-1B petition with USCIS with the fired H-1B employee as beneficiary and obtained USCIS's approval to hire him, thus ending the former H-1B employer's obligation to pay that fired employee's return transportation costs to his home country. Another example is *Baiju v. Fifth Avenue Committee*,²⁴ in which the ARB held that the H-1B nonimmigrant employee's rejection of the employer's offer to reimburse him for his return transportation costs, when the employer terminated his employment, absolved the employer of any further liability to pay wages. Similarly, in *Wirth v. University of Miami*²⁵, the Board held that the H-1B employer effected a bona fide termination of the employment relationship notwithstanding the fact that the employer did not pay the costs for the H-1B employee's return to her home country. In *Wirth*, when the employer informed the H-1B employee that it was terminating her employment, the H-1B employee declined the employer's offers to pay transportation costs home and refused to respond to the employer's requests for travel cost information.

Here, the ALJ determined that Cronous's liability for paying wages to Vinayagam ended with its January 15, 2009 notice to USCIS that it had terminated her employment, because although it did not provide payment for transportation costs home or offer to do so, Vinayagam voluntarily chose to remain in the United States, admittedly without a valid visa or other legal permission or authority to be in the United States.²⁶ In reaching this conclusion, the ALJ determined that the evidence offered on summary decision was sufficient to meet Cronous's burden of proving that it effected a bona fide termination of its wage liability notwithstanding having neither offered nor provided payment for Vinayagam's return to her home country.²⁷

Because Cronous submitted evidence in support of its motion for summary decision sufficient to prove that there is no triable issue of fact, evidence that is uncontroverted, Cronous established an evidentiary basis for a ruling in its favor. Cronous also demonstrated that it is entitled to summary decision as a matter of applicable law. Accordingly, we affirm the ALJ's

²³ ARB No. 13-013, ALJ No. 2011-LCA-025 (ARB July 16, 2014).

²⁴ ARB No. 10-094, ALJ No. 2009-LCA-045 (ARB Apr. 4, 2012 (reissued decision)).

²⁵ ARB Nos. 10-090, -093; ALJ No. 2009-LCA-026 (ARB Dec. 20, 2011).

²⁶ See Order at 8-11.

²⁷ Had the evidentiary record demonstrated that Cronous's failure to meet its obligation of providing for Vinayagam's return transportation to her home country left her in the U.S. against her will, the conclusion in this case would have been different. However, the evidentiary record clearly establishes that Ms. Vinayagam voluntarily chose to stay in the U.S. after having been informed that her employment was terminated.

grant of summary decision and dismissal of Vinayagam's claim for further wages. Consequently, the piercing of the corporate veil issue is moot and we do not reach it.

CONCLUSION

For the foregoing reasons, the ALJ's order granting summary decision is **AFFIRMED**.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LEONARD J. HOWIE
Administrative Appeals Judge

E. Cooper Brown, Administrative Appeals Judge, concurring:

I concur in the majority's decision. I write separately to express a concern raised by the facts under which Ms. Vinayagam was employed.

Ms. Vinayagam testified that when she starting work for Cronous in February 2008, Cronous "didn't have a job for me. They put me in a guesthouse and started marketing my resume . . . they didn't pay me salary . . . [and] didn't even pay me during that time that I was in the guest house." Vinayagam Deposition at 14-15, Respondent's Exhibit A. Cronous purportedly paid Ms. Vinayagam's salary when it was able to contract her services to other companies, which only occurred once, and then for only three months. Otherwise, throughout the duration of her "employment" with Cronous she was not regularly paid salary or other wages. Ms. Vinayagam described Cronous as a "consulting company" without "direct clients" and herself as "a contractor." *Id.* at 18-19, 21. Cronous did not submit evidence to refute any of this testimony.

Ms. Vinayagam's testimony is effectively corroborated by the Department of Labor's Wage and Hour Division. Upon complaining to the Labor Department in May 2009 that Cronous underpaid her wages during the period of her employment, Wage and Hour investigated and determined that for the period covering June 1, 2008, to May 1, 2009, Cronous failed to pay Ms. Vinayagam \$24,166.65 in wages during the 10 months from February to November 2008.

Respondent's Exhibit L; *see also* WHD's Debra Brown letter to Cronous (June 24, 2013). Cronous did not submit evidence to refute this 2008 underpayment. Cronous clearly failed to comply with the attestations it made in the LCA it signed and filed with the Labor Department that it would employ Ms. Vinayagam as a full-time, salaried, Programmer Analyst, pay her \$52,000 a year, and comply with the requirements of 20 C.F.R. Part 655, Subparts H and I, which regulations require that a salaried H-1B nonimmigrant employee such as Ms. Vinayagam be paid "in pro-rated installments . . . no less often than monthly." 20 C.F.R. § 655.731(c)(4).

These facts suggest a concern that hopefully the Department of Labor, and the Wage and Hour Division in particular, will prioritize for investigation should similar situations come to the Department's attention. My concern is similar to that which I originally raised in *Gupta v. Compunnel Software Group*, ARB No. 12-049, ALJ No. 2011-LCA-045 (ARB May 29, 2014), involving the deceptive practice of "Job Shopping" by "staffing companies."²⁸

Under 8 U.S.C.A. § 1182(n)(1)(F), it is illegal for an H-1B employer to place a nonimmigrant worker with another employer (regardless of whether or not such other employer is an H-1B-dependent employer) where the nonimmigrant performs duties in whole or in part at one or more worksites owned, operated, or controlled by such other employer, where there are indicia of an employment relationship between the nonimmigrant and such other employer.²⁹ It would appear from the facts presently before the Board in this case, as was suggested by the facts presented in *Gupta v. Compunnel*, that some H-1B employers may be skating above this legal

²⁸ See U.S. Gov't Accountability Office, GAO-11-26, *H-1B Visa Program: Reforms are Needed to Minimize the Risks and Costs of Current Program* 52-55 (2011) (recommending stricter enforcement against H-1B "staffing companies" because, among other problems, "workers procured by staffing companies were either not working for the employer listed or not performing the duties described on the LCA"). See also Donald Neufeld, Memorandum, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements*, U.S. Citizenship & Immigration Services, U.S. Dept. of Homeland Security (Jan. 2010).

²⁹ 8 U.S.C.A. § 1182(n)(1)(F) provides:

(F) In the case of an application described in subparagraph (E)(ii), the employer will not place the nonimmigrant with another employer (regardless of whether or not such other employer is an H-1B-dependent employer) where--

(i) the nonimmigrant performs duties in whole or in part at one or more worksites owned, operated, or controlled by such other employer; and

(ii) there are indicia of an employment relationship between the nonimmigrant and such other employer; unless the employer has inquired of the other employer as to whether, and has no knowledge that, within the period beginning 90 days before and ending 90 days after the date of the placement of the nonimmigrant with the other employer, the other employer has displaced or intends to displace a United States worker employed by the other employer.

prohibition through enterprising means, to the detriment of nonimmigrant workers whom the cited regulation seeks to protect.

E. COOPER BROWN
Administrative Appeals Judge