U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 February 2003

CASE NO.: 2003-LCA-2

In the Matter of:

GUY SANTIGLIA,
Complainant
vs.

SUN MICROSYSTEMS, INC.,
Respondent.

DECISION AND ORDER

INTRODUCTION

This proceeding arises out of a Determination issued by the Administrator of the Wage and Hour Division of the Employment Standards Administration of the Department of Labor ("Administrator") under the enforcement provisions of the Immigration and Nationality Act ("Act"), 8 U.S.C. §§ 1101(a)(15)(H)(i)(b) and 1182(n) ("H-1B provisions"), and the implementing regulations at 20 C.F.R. Part 655, Subparts H and I, which were promulgated under the Act. Guy Santiglia, filed complaints with the Administrator alleging that the Respondent, Sun Microsystems, violated various provisions of the Act and implementing regulations concerning the Labor Condition Application ("LCA") procedures. The Administrator issued a Determination finding that the Respondent violated the posting requirements but that the violation was not substantial or willful. The Complainant disagreed with the Determination and filed a timely request for hearing with the Office of Administrative Law Judges ("OALJ") challenging the Administrator's findings.

For the reasons set forth below, I find the Respondent's LCA posting practices violate 20 C.F.R. § 655.734(a)(1)(ii)(A) and that the Respondent denied the Complainant access to the public access documents, but that neither violation was willful or substantial.

ANALYSIS AND FINDINGS

PROCEDURAL BACKGROUND

The Complainant initially filed a complaint with the Department of Labor through an e-mail communication on February 7, 2002, complaining about the access the Respondent gave him to its LCA public records. (Complainant's Exhibit 1.) He alleged that the Respondent used expired forms, that the LCAs were not properly posted, that he was given limited access to the LCAs when he asked to see them, and that he was denied access to the exact pay paid to the H-1B workers hired under the

LCAs. On February 25, 2002, the Complainant provided more details concerning his complaint and added allegations that the Respondent had replaced American citizen workers with H-1B non-immigrant workers; that the Respondent was limiting the amount of time he had access to the LCA files; and that the Respondent hired H-1B employees for a job that did not meet the "specialty occupations" requirement under the law. He also stated that he did not believe that the Respondent was stating the "prevailing wage" properly. He urged that the Respondent be found to be a wilful violator. (Complainant's Exhibit 3.) The Complainant made additional complaints by fax on March 1, 2001, and at some point after March 31, 2001[1], about his access to the LCA records. (Claimant's Exhibits 4 and 5.)

After investigating the Complainant's complaint, the Administrator issued a Determination on October 4, 2002, finding only that the Respondent had failed to post LCAs in its Sunnyvale, California, and Austin, Texas, locations. The Administrator did not find the violation to be wilful and assessed no civil penalties. The Respondent was ordered to post the LCAs starting July 24, 2002, for 10 days and to comply with 20 C.F.R. § 655.805(a)(4) in the future. (Complainant's Exhibit 8.) The Complainant disagreed with the Administrator's determination and requested a hearing.

The Complainant's request for hearing was received by the Chief Administrative Law Judge in the Washington, D.C. Office of Administrative Law Judges on October 17, 2002. His request was forwarded to the San Francisco OALJ Office where it was received on October 21, 2002, and assigned to me. On October 30, 2002, I issued a Notice of Hearing and Pre-hearing Schedule notifying the Complainant and the Respondent that this matter was scheduled for a hearing on November 25, 2002. On November 12, 2002, the Administrator filed a "Motion to Realign Parties and Correct Caption" asking that the parties be realigned to show the Administrator as the prosecuting party.

The Administrator's motion, along with a motion the Complainant filed asking for a continuance, was discussed in a conference call conducted on November 14, 2002, with counsel for all three parties. During the conference call, I denied the motion to realign the parties, noting that while the Administrator would be the prosecuting party if the Respondent had initiated this action with a hearing request, the Complainant was the proper prosecuting party in this instance where he disagreed with the Administrator's Determination and filed the request for hearing. The Administrator then asked to intervene in this action, and the request was granted. With agreement of all parties, the November 25, 2002, hearing was continued to December 16, 2002. Subsequently, the Administrator filed a motion on November 18, 2002, to withdraw as a party intervener. This motion was opposed by both parties, but was granted on December 4, 2002.

The hearing in this matter began on December 16, 2002, in San Francisco, California. The Complainant, his counsel, Michael M. Hethmon, and respondent's counsel, Roxana Bacon, all

[1] The complaint the Complainant made in Exhibit 5 is undated.

appeared and participated in the hearing on December 16, 2002. All testimony was completed on December 16, 2003. At the beginning of the hearing on December 17, 2002, Mr. Hethmon advised the Court that he was withdrawing as counsel at the Complainant's request, and that the Complainant would represent himself from that point on. The hearing concluded on December 17, 2002, with rulings on the exhibits and closing arguments.

ISSUES INCLUDED IN THIS DECISION

The Complainant alleged in his complaints to the Department of Labor that the Respondent violated a number of the LCA regulations. These included allegations that he was denied access to the LCA public records; that the Respondent used outdated LCA forms; that the LCAs were not posted in a common area; that he was denied documentation about the exact pay of the H-1B workers; that American workers were replaced with H-1B workers; that his access to the public records was restricted and infrequent; that H-1B workers were hired for a job that did not meet the requirements for "specialty occupations;" and that the Respondent was not stating the "prevailing wage" properly. In his prehearing statement, the Complainant made specific factual allegations in support of the more general allegations he initially made to the Department of Labor.

However, in his prehearing statement, the Complainant added allegations that he did not make to the Administrator. Specifically, he alleged that the Respondent made a misrepresentation of a material fact because some of the LCAs purportedly signed by Ms. Wilson had obviously been signed by someone else because the signatures differed; that the Respondent falsely attested that employment of the H-1B workers would not have an adverse effect on the working conditions of American workers; and that the Respondent failed to accurately specify the number of workers sought.

The enforcement provisions of the LCA regulations provide that an aggrieved party, such as the Complainant, can file a complaint alleging a violation described in 20 C.F.R. § 655.805(a). 20 C.F.R. § 655.806. If the Administrator determines that there is sufficient cause to investigate the complaint, he investigates the complaint. There is no right to appeal or to a hearing if the Administrator determines that a complaint is insufficient to warrant an investigation. If an investigation is conducted, at the conclusion of the investigation, the Administrator makes a determination as to the merits of the allegations in the complaint. 20 C.F.R. § 655.806. After the determination is issued, the complainant, respondent or an interested party may request a hearing for a review of that determination. 20 C.F.R. § 655.820.

The OALJ regulations at 29 C.F.R. § 18.43(c) provide that if issues not raised in the request for hearing, prehearing stipulations or prehearing order are tried with the express or implied consent of the parties, then, they shall be treated as if they had been raised in the pleadings. The Respondent filed a motion in limine asking to exclude the Complainant's argument that its policy of filing "blanket LCAs" violated the LCA regulations, which is the essence of the Complainant's prehearing statement allegation that the Respondent failed to accurately specify the number of workers sought. At the start of the hearing, after hearing arguments from both parties, I granted the Respondent's motion to

exclude the claim that its use of blanket LCAs violated the regulations. (HT[2], p. 32.)

Where, as here, the Complainant alleges new violations at the time of hearing and the Respondent objects to the new violations being addressed at the hearing, the new alleged violations cannot be included as an issue in the hearing without agreement by the parties. The regulations about complaints of violations of the LCA regulations specifically state that if the Administrator determines that a particular complaint does not warrant an investigation, there is no right to a hearing or an appeal of that determination. Thus, the Administrator must make the initial determination as to whether a particular complaint warrants an investigation, and if it does, then that complaint can ultimately come before the OALJ for a hearing. The Complainant's complaint about the use of the blanket LCAs was not raised with the Administrator. To consider alleged violations that were never brought before the Administrator would take away from the Administrator his or her authority to determine whether the complaint warrants an investigation and, conceivably, provide a complainant with a right of appeal and hearing that he or she is not otherwise entitled to under the regulations.

The OALJ regulations can be interpreted to allow inclusion of allegations not raised before the Administrator if the parties consent. However, in this case, the allegation concerning the use of the blanket LCAs was not brought to the attention of the Administrator, and the Respondent did not consent to the issue being litigated at the hearing. Thus, it is not included as an issue in this decision.

The Respondent did not object to consideration of the allegations regarding Ms. Wilsons signature and the alleged misrepresentation that employment of the H-1B workers would not have an adverse impact on U.S. workers. In any event, I find the latter allegation was merely a more precise articulation of the Complainant's earlier complaint to the Administrator that U.S. workers were being replaced by H-1B workers. Thus, both of these issues will be addressed in this decision.

FACTUAL BACKGROUND

Labor Condition Application Process

The Immigration and Nationality Act defines various classes of aliens who may enter the United States for prescribed periods of time and for prescribed purposes under various types of visas. 8 U.S.C. § 1101(a)(15). One class of aliens, known as "H-1B" worker, are allowed entry to the United States on a temporary basis to work in "specialty occupations." 8 U.S.C. § 1101(a)(15)(H)(i)(B); 20 C.F.R. § 655.700. An employer who wants to hire an alien in a specialty occupation on an H-1B visa must follow

a procedure laid out in the Code of Federal Regulations which involves the Department of Labor, as well as the Department of State.

To hire an H-1B worker, the employer must first complete a Labor Condition Application

[2] References to "HT" are to the Hearing Transcript.

("LCA") and file it with the Employment and Training Administration of the U.S. Department of Labor. In the LCA, the employer must make certain representations and attestations regarding his responsibilities, including a representation that the alien will be paid at the actual wage level paid to all other individuals with similar experience and qualifications for the employment in question or the prevailing wage for the occupational classification in the area of employment. 8 U.S.C. § 1182(n). The attestation and representation relevant to this proceeding[3] includes a requirement that the employer certify that he has provided notice of the filing of the LCA to his employees by physically posting a copy of the LCA in a conspicuous location at the place of employment in the occupational classification for which the H-1B workers are sought. The employer is also required to make available for public examination at the employer's principal place of business, within one working day after the LCA is filed, a copy of the application, along with any necessary supporting documentation. 8 U.S.C. § 1182(n); 20 C.F.R. § 655.705(c). The LCA includes information about the job title, the employer's name, the area of intended employment, the dates of intended employment, the prevailing wage, actual wage or a wage range for the position, the source of the employer's wage information, and the number of positions requested by the LCA. (HT, p. 131.)

After the LCA has been certified by the Department of Labor, the employer submits a copy of the certified LCA to the Immigration and Naturalization Service ("INS") along with the non-immigrant visa petition to ask for a H-1B classification for the worker. 20 C.F.R. § 655.700. If the H-1B classification is approved by the INS, the non-immigrant can apply for an H-1B visa at a consular office for entry into the United States or for a change in his or her visa status, if the non-immigrant is already in the United States. The employer can hire the H-1B worker after the INS grants the visa for access to the United States.

Factual Background

The Respondent, Sun Microsystems, is a multi-national employer with over 37,000 employees worldwide. (HT, p. 168.) Its corporate headquarters are located in Newark, California, but it has facilities throughout the United States, including several in the San Francisco/San Jose area. It employs H-1B workers in various jobs. Heidi Wilson, the Respondent's Corporate Immigration Manager, manages the Respondent's immigration program, including preparation of the LCA documents, and supervises the outside counsel hired to prepare the LCAs. Ms. Wilson or her assistant usually signs the LCAs, but she sometimes gives specific authorization to the Respondent's outside law firm to sign the LCA when she is unavailable. (HT, p. 130.) She is also responsible for posting the LCAs and maintaining the LCA public

access files. All the LCA applications and files are kept in a secure location at the corporate headquarters, in Newark, California, where her office is located.

The Respondent's practice is to post two copies of the LCA, one at the corporate offices in

[3] There are other attestations required of the employer that are not at issue in this proceeding.

Newark, California, and one at the job site. (HT, p. 146.) Ms. Wilson wrote the Respondent's LCA job site posting procedure. (HT, p. 144.) The job site notice is posted by the hiring manager or supervisor. If an H-1B worker is going to be hired, Ms. Wilson sends the hiring manager a hard copy of the LCA posting requirements or e-mails the manager a copy of the posting procedure. (Respondent's Exhibits 1 and 4.) The posting procedure, Respondent's Exhibits 1 and 4, instructs the hiring manager to post the LCA in the employee's work site in the same location as the wages/salary notices for 10 business days and to then return the LCA to her office with a notation of the dates and location of the posting. Ms. Wilson posts a copy of every LCA that the Respondent files in the hallway at the Respondent's corporate office in Newark, California. (HT, p. 146, 180.) Ms. Wilson's assistant keeps a spreadsheet record of where the LCAs were sent for posting, who they were sent to, and when they were posted. (HT, p. 149.) Under the Respondent's posting procedures, each LCA is stamped on the back to show the date of the posting, the person who did the posting, and the location of the posting. (HT, p. 150.)

The Respondent had a practice of submitting applications for "blanket LCAs" by submitting LCAs asking for multiple H-1B workers, instead of making a specific request for workers as needed. (HT, p. 134.) Though the blanket LCAs were certified by the Department of Labor for the number of positions indicated, the Respondent did not always fill all the positions requested in the LCAs. (HT, p. 136.) These blanket LCAs were sometimes used where a new LCA was needed for an existing H-1B worker, such as in situations where there were material changes in the H-1B worker's job situation, including changes in the job site or a promotion. If there was a job site change, the blanket LCA would be posted at the new job site. (HT, p. 138.)

The Complainant started working at Sun Microsystems as a contract employee on November 29, 2000. He started to work directly for the Respondent as an IR Technologist II beginning July 16, 2001, and worked until November 5, 2001, when he was laid off. He worked in Building 19 of the Respondent's Santa Clara campus. (HT, p. 55.) He was working under Fred Peters, the area support manager for the Respondent's IT department covering Santa Clara, California, at the time he was laid off. The Complainant's department provided internal support for computer users on the Santa Clara campus. In August 2001, Mr. Peters had 27 employees in his department working as system technologists [4] ("ST") at four different levels, I through IV, with the ST I's as the most junior employee. The Complainant was a ST II. When the Respondent had to lay off employees, Mr. Peters made the decision as to which employees would be laid off in his department. In that lay-off, he had to reduce his staff by 4 employees, a 16.5% reduction. He made the determination as to which employees to lay off by first identifying the employees he felt could not afford to lose. At this step, he eliminated from the lay-off pool those employees with unique knowledge and those who were quick producers and who were guaranteeing the success of his group. This eliminated 2/3 of his staff from the lay-off pool. He made his final decision as to who to lay off based on how well the employees performed, how much knowledge they had, and how long they had been with the Respondent. (HT, p. 207.) The Complainant was one of the four employees Mr. Peters laid off. No

[4] The IR Technologist and System Technologist job titles were apparently interchangeable.

new employees have been hired for Mr. Peters' department since the Complainant was laid off. (HT, p. 208.) Since the Complainant's lay-off, Mr. Peters has lost another 3 employees through lay-off and 2 employees through transfers to other groups.

After the Complainant was laid off, he became concerned about the possible impact H-1B workers had on the lay-off of the Respondent's employees. He contacted Ms. Wilson and asked for access to the LCA files, which were located in the Respondent's Newark Office. Ms. Wilson advised the Complainant that he could see the LCA documents between the hours of 10 and 4. (HT, p. 153.) The Complainant subsequently reviewed the Respondent's LCA public access files on 10 different occasions for a total of 30 hours. (HT, p. 152.)

The Complainant reviewed the public access records on February 6, 2002. (HT, p.77.) On February 7, 2002, he contacted the Department of Labor by e-mail and complained that the Respondent had used expired LCA forms, that he never saw the LCA posted, that he was given inadequate time to review the LCA files, and that he was denied access to documentation showing the exact pay of the H-1B workers. (Complainant's Exhibit 1.) The Complainant reviewed the LCA files again on February 11, 2002, (HT, pp. 77-78), and February 26, 2002, (HT, p. 78). On February 25, 2002, the Complainant sent a letter to Christine Hollenbeck, an investigator for the Department of Labor, informing Ms. Hollenbeck that the Respondent had replaced American workers with H-1B non-immigrant workers. He also alleged that the IR System Technologist I and II positions did not qualify as "specialty occupations," that he never saw or heard of a "Labor Condition Application" until he was replaced by a H-1B employee, that the Respondent was not posting the LCAs as required by law, and that they were not stating the "prevailing wage" properly. (Complainant's Exhibit 3.)

On March 31, 2002, Ms. Wilson notified the Complainant by e-mail that the Respondent felt it had provided the Complainant with reasonable access to the LCA files and would not be allowing him any additional time. (Complainant's Exhibit 24.) She did this after 3-4 individuals expressed concern about what was happening in the lobby of the corporate office where the Complainant reviewed the records. They reported that they had observed him raising his voice, arguing with the security personnel, and appearing very angry and intense. (HT, p. 154.) At the time, the Complainant was having a disagreement with various individuals over the Respondent's refusal to allow him to photograph the LCAs. The receptionist told Ms. Wilson that she was uncomfortable with the Complainant's presence because he was very intense and another person, who observed the Complainant's interaction with the security guard, told Ms. Wilson that she saw the Complainant angry and challenging the security guard and was concerned that the incident could have escalated. (HT, p. 155.)

After receiving Ms. Wilson's March 31, 2002, e-mail barring him from further access to the LCA files, the Complainant wrote Ms. Hollenbeck and alleged he was being denied access to the LCA public access files. (Complainant's Exhibit 5.) The Complainant subsequently made additional complaints about his access to the LCA files, as well as an allegation that the Respondent had

modified some of the documents in the LCA files. (Complainant's Exhibits 4-6.)

After Ms. Wilson barred the Complainant from reviewing the LCA documents, she attempted to discuss the situation with a Department of Labor attorney. When the Department of Labor attorney did not respond to her phone call, Ms. Wilson contacted Cesar Avila, a Department of Labor employee who was auditing the Respondent's LCA public access files. Mr. Avila informed Ms. Wilson that the Complainant was entitled to view the LCA files and suggested that she use a log sheet to document the dates and times individuals looked at the public access files. (HT, p. 159.) He also informed Ms. Wilson that it was appropriate to prohibit copying or photographing or photocopying of the documents. (HT, p. 159.) After consulting with Mr. Avila, Ms. Wilson again gave the Complainant access to the files but required him to sign a log recording the dates and times he was given access.

On July 22, 2002, the Complainant contacted Ms. Wilson again by e-mail and asked to review the LCA public access files. Ms. Wilson responded and asked him what he was specifically looking for. The Complainant asked to see all the LCAs filed with a 2002 "begin date," and he asked for specific wage data for certain H-1B "visa holding employees." Ms. Wilson responded by e-mail that they would make arrangements for the Complainant to review the LCAs but that the specific wage data would not be provided because it was subject to the Privacy Act. (Complainant's Exhibit 28.) Ms. Wilson later informed the Complainant on July 24, 2002, by e-mail that he would be allowed to see wage information, including prevailing wages contained in or with the LCAs but he would not be allowed to see salary information for individual employees without a court order or subpoena. (Complainant's Exhibit 30.) Beginning July 2002, Ms. Wilson required the Complainant to sign a log which recorded the dates and times the Complainant was given access to the public LCA files.

The Complainant reviewed the LCA public access records on July 29, 2002. (Respondent's Exhibit 3.) On August 22, 2002, the Complainant refused to sign the log, but the security guard allowed him to view the files after noting that he had refused to sign the log. After Ms. Wilson learned that the Complainant had been allowed to view the records after refusing to sign the log, she instructed the security guard to only allow access to individuals who signed the log. (HT, p. 161.) The Complainant reviewed the files on October 2, 2002, after signing the log. On October 3, 2002, the Complainant was approximately half an hour late for his appointment to review the files and refused to sign the log. He did not review the files and arranged to return on October 8, but did not appear on October 8. On October 8, 2002, Ms. Wilson sent the Complainant an e-mail message informing him that the sign-in log book was suggested by the Department of Labor and reminding him that the Respondent's prohibition against "reproduction" of the documents meant no photocopying or photographing of the materials. She advised him that he could take notes. (Complainant's Exhibit 7; Respondent's Exhibit 2.) The Complainant responded that he would not sign the log book and that he would file another complaint with the Department of Labor in an effort to resolve the issue if Ms. Wilson insisted on his signature. (Respondent's Exhibit 2.) The Complainant made no requests to examine the LCA files after October 8, 2002.

The Alleged Posting Violations

The Complainant identified a number of specific posting violations in his prehearing statement. He alleges that during his employment two new H-1B employees, Andre Bashkin and Raghava Karumanchi, were hired to work in his building under the LCA assigned ETA Case Number 30253059 dated December 7, 2000, which was admitted as Complainant's Exhibit 10, but no LCA notice was posted.

As the prosecuting party, the Complainant the burden of proving each of his allegations. However, he has offered no evidence whatsoever to support this alleged violation. First, there is no evidence that Andre Bashkin and Raghava Karumanchi are employees of the Respondent or that they are H-1B employees. Thus, there is no evidence that a LCA was required before they were hired. Moreover, even if these individuals were H-1B workers, there is no evidence that the LCA identified as Complainant's Exhibit 10 has any relationship whatsoever to these two individuals.

The Complainant also asserts in his prehearing statement that two H-1B employees were hired into his work area under the LCA that was admitted into evidence as Complainant's Exhibit 16, but neither he, nor any other co-workers in his building saw Complainant's Exhibit 16 posted. Again, there is insufficient evidence to support the Complainant's allegations. Also, though the Complainant made separate allegations about the failure to post his Exhibits 10 and 16, these two exhibits are the same LCA. The Employer's Control Number for both exhibits is "63468." The documents appear to be physically different, they refer to the same position, location, prevailing wage, prevailing wage rate and salary ranges. Page 4 of Complainant's Exhibit 16 shows it was posted at the Respondent's corporate building, which is consistent with its posting practices. The Complainant's copy of Complainant's Exhibit 10 did not include the back of the LCA, so there is no way to determine what posting information was on it.

However, as with his allegation regarding Complainant's Exhibit 10, there is no evidence that any H-1B workers were actually hired under the LCA that is Exhibit 16. The Complainant did not identify the H-1B employees allegedly hired under the LCA in Complainant's Exhibit 16, and Ms. Wilson testified that the Respondent did not always hire the H-1B workers that were authorized under a certified LCA. Moreover, I do not find credible the Complainant's testimony that he did not see Complainant's Exhibit 16 or any other LCA posted. The Complainant stated in his first complaint to the Department of Labor that he never saw or heard of a LCA posting while he was employed by the Respondent and that he learned of the postings after he was laid off. Given his lack of familiarity with the LCA program and postings, he may have seen a posting and not recognized its significance. Moreover, he has not indicated that he was ever in the break room or whatever location was used for posting the LCAs in his building.

Additionally, his testimony that no LCAs were posted in his building is not corroborated. There is

no evidence[5] that any of his co-workers did not see the LCA posted.

The Complainant also alleged in his prehearing statement that the posting verification on the back of some LCA forms showed the LCAs were not posted at the location the H-1B workers would be working at and that both copies of the LCAs were sometimes posted at the corporate office. He referred to Complainant's Exhibits 16, 17, 18, and 19[6] as supporting his allegation that the LCAs were only posted in the corporate office instead of at the work site. While all four exhibits do establish that they were posted at the corporate office, they do not establish that they were not also posted at the work site. Ms. Wilson testified that every LCA was posted at two locations, at the corporate office and at the work site. Complainant's Exhibit 17 actually confirms that such a posting was done for that LCA. Page 1 of Exhibit 17 shows it was posted in Santa Clara, where the positions were to be located, and page 4 of Exhibit 17 shows it was posted at the corporate building. Though Ms. Wilson testified that her assistant maintained a log of showing where and when each LCA was posted, the Complainant did not request that log during discovery or offer evidence of its contents to show that the LCAs in question were only posted at the corporate office and were not posted at the job site. Since the Complainant has the burden of proof, it was incumbent on him to offer the evidence to support his allegations.

Finally, the Complainant alleges that the Respondent failed to post the LCA that was admitted as Complainant's Exhibit 18 at every place of work that one of the 50 H-1B employees included in the LCA might work. Again, the Complainant's evidence is inadequate to show that the LCAs were not posted at the job site as required.

Though the Complainant has failed to prove his specific posting allegations, the evidence does show that the Respondent's posting practices do not conform to the requirements of 20 C.F.R. § 655.734(a)(1)(ii)(A). This provision requires that where there is no collective bargaining representative, such as in this instance, the employer must provide notice of the LCA filing by posting a notice in at least <u>two</u> conspicuous locations at each <u>place of employment</u> where any H-1B non-immigrant will be employed so that workers in the occupational classification at the place(s) of employment can easily see and read the posted notice. The Respondent's practice was to post two notices, one at the work site, and one at the corporate headquarters in Newark, California.

The statute requires an employer filing a LCA to state that it has provided notice of the LCA filing to its employees by a "physical posting in conspicuous locations at the place of employment... to employees in the occupational classification for which H-1B nonimmigrants are sought." (8 U.S.C. § 1182(n)(1)(C)(ii).) The purpose of this requirement was to ensure that U.S. workers who might

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[5] The Complainant offered a number of e-mail messages from alleged former co-workers concerning LCA posting as exhibits, but these exhibits were excluded because they could not be authenticated.

[6] The Complainant also referred to Complainant's Exhibit 20 in his prehearing statement, but that exhibit was excluded.

be affected by the hiring of H-1B workers are given adequate notice of the proposed hiring and informed of their right to learn more about the proposal and to file a complaint if they chose to. This is made abundantly clear by the various comments that have been published by the Department of Labor in the regulations adopted regarding the notice requirement.

In comments published in 1994 when the final regulations were adopted, the Department of Labor noted that there had been a problem with employers who placed H-1B workers at new worksites within the area covered by an existing LCA but were able to ignore their LCA posting obligations with impunity because no notices were posted at the new worksite giving notice to the adversely affected workers of the LCA standards and their right to review documents and file complaints. 59 FR 65647. The Department of Labor indicated that it would remedy this problem by requiring that the LCA be posted at each new worksite within the same area of intended employment at the time the H-1B worker was sent there. 59 FR 65648. There was also concern about the timing of the posting of the notice. The Department of Labor adopted a requirement that the LCA be posted within 30 days before the application was filed, stating that the time frame was being adopted "[i]n order to alleviate confusion and to better assure the achievement of Congressional intent that U.S. workers who will be working side-by-side with H-1B nonimmigrants be notified of the employer's intent and their ability to file complaints if they believe violations have occurred."

Concern about adequate notice also resulted in a change in the definition of "place of employment." "Place of employment," which was initially defined as "the worksite or physical location where the work is performed," 20 C.F.R. § 655.715 (1992), was modified in the 1994 final rules to add the word "actually" to the definition, so that the current definition defines "place of employment" as "the worksite or physical location where the work actually is performed." 65 F.R. 80161. The importance of notice to the actual employees who will work along side the H-1B workers was reiterated in the Department of Labor's comments in 2000 concerning the need for notice to employees of third party employers. The Department of Labor stated "...the purposes of notification can only be satisfied by notice to all of the affected workers - *i.e.*, all of the workers in the occupation in which the H-1B worker is employed at the placement of employment, including employees of a third party employer." 65 F.R. 80161.

The regulations very specifically require that the LCA be posted in two or more conspicuous places so that workers at the place of employment can read them. By posting only one copy of the LCA at the work site, while one copy is posted at the corporate headquarters, the Respondent has failed to comply with the requirement. The Respondent was not precluded from posting a copy of the LCA at the corporate headquarters, but that posting did not relieve the Respondent of the requirement to post a second copy of the LCA at the location where the H-1B worker would be working. Thus, I find the Respondent has failed to comply with the posting requirement at 20 C.F.R. § 655.734(a).

The Alleged Failure to Provide Proper Public Access to LCA Documents

The Complainant alleges that the Respondent failed to provide him with proper public access to the LCA documents because it required him to make an appointment to see the documents, would

not let him photograph or copy the documents, refused to allow him access to more than one box of documents at a time, denied him access to the files from March 13 until July 22, 2002, and refused to provide him with specific wage information about the specific salaries being paid to the H-1B workers. He also alleges that he was denied access because he was not allowed immediate access to the LCA public access files when he appeared at the Respondent's Santa Clara campus and asked to see the files

Ms. Wilson acknowledged that she notified the Complainant in March 2002, that he would not be allowed any further access to the LCA public records. She later allowed the Complainant access to the LCA public files again after conferring with the Department of Labor, but, at the suggestion of a Department of Labor employee, she required the Complainant to sign a log book to get access. The Complainant was given access to the LCA public access files as long as he signed the log book. The refusal to allow the Complainant access to the public LCA files after March 31, 2002, was a violation of the rules requiring public access to LCA documents.

I do not find the Respondent's failure to make the files available to the Complainant in Santa Clara to constitute a violation. The regulations at 20 C.F.R. § 655.705(c)(2) require that the public access records be maintained at the employer's "principal place of business," which, in this instance, is the Respondent's corporate headquarters in Newark, California. They were not required to keep the records in Santa Clara.

I also do not find the requirement that the Complainant make an appointment to see the files, the limitation as to how many boxes of files he can examine at one time, and the requirement that he sign a log book before being given access to the files to be violations of the public access regulations. None of these requirements and limitations denied the Complainant access to the files. The regulations do not state that the public access files are to available on demand. Similarly, I do not find the prohibition against photographing or copying the files to be a violation of the public access regulations. The regulations merely state that the files must be made available for public examination. They do not require that the files be made available for "examination and copying."

I also do not find the Respondent's failure to provide the Complainant with access to the specific wages paid to specific H-1B workers to be a violation of the regulations. While the employer must include documentation about the wage rate to be paid the H-1B worker in the public files, and must maintain specific payroll records and individual wage data, the payroll records and wage data are not considered part of the public record and are only provided to the Department of Labor on request. 20 C.F.R. § 655.760.

20 C.F.R. § 655.760(a)(2) requires employers to include in the public access records documentation which provides the wage rate to be paid the H-1B non-immigrant. This provision is ambiguous in that it does not specifically state that the employer must include as a part of the public record the specific wage rate to be paid to specific H-1B workers. The regulations actually do not require the public records to include the identity of the H-1B workers hired under a LCA, and specific

individual wage information is excluded from public access in 20 C.F.R. § 655.760(a)(4), though that information must be made available to the Department of Labor upon request. Given the absence of a requirement to identify the H-1B workers by name and the confidential treatment accorded specific individual wage information, I conclude that while the wage rate to be paid a H-1B workers hired under an LCA must be made part of the public access records, there is no right of public access to the specific wage being paid a specific worker under the LCA. Thus, I find the Complainant had no right to information about the specific salary being paid to specific H-1B workers.

The Alleged Failure to Accurately State the Wage To Be Paid the H-1B Worker

With reference to the Complainant's allegation that the Respondent failed to accurately state the prevailing wage to be paid to the H-1B workers, the Complainant alleged in his prehearing statement that the Respondent failed to accurately state the wage that would be paid to two H-1B workers hired in August 2001, whom he identified as Andre Bashki and Raghava Karumanchi. In his prehearing statement, he asserted that these two individuals were hired under the LCA found in Complainant's Exhibit 10 which identified the prevailing wage as $49,143. He alleged that while Mr. Karumanchi was allegedly paid $72,500, which was above the prevailing wage identified in Complainant's Exhibit 10, it was below the prevailing wage of $79,673.08 which was identified in another LCA filed on May 3, 2001.

The Complainant has failed to offer evidence to support his claim. There is no evidence that Andre Bashki and Raghava Karumanchi are, in fact, H-1B workers or that they worked in his department. There is also no evidence that they were hired under the LCA identified as Complainant's Exhibit 10. There is no reliable evidence establishing the actual salary paid to Mr. Karumanchi. The Complainant based his salary claim on a table included in Complainant's Exhibit 12 which identified the salaries paid to two H-1B workers in the Complainant's department but did not identify the workers by name. Complainant's Exhibit 12 does not even mention Mr. Karumanchi as being an employee of the Respondent's. Moreover, the record does not include a May 3, 2001, LCA, so it is not possible to even determine whether the LCAs he referred to were for the same facility.

The Complainant also included in his prehearing statement other allegations that the Respondent failed to accurately identify the prevailing wage, claiming that various LCAs filed a few weeks apart had drastically varying figures given as the prevailing wage for the same job in slightly different, but close, geographic locations. Unfortunately, there is no evidence to support these allegations.

The Alleged Misrepresentations of a Material Fact

The Complainant alleges that some of the Respondent's LCAs were invalid because they included false attestations because they were not signed by Ms. Wilson, though the signatures on the LCAs were purported to be hers. Ms. Wilson's failure to personally sign each LCA does not

invalidate the LCA. She testified that her assistant is authorized to sign on her behalf and that on occasion, she specifically authorized the Respondent's outside counsel to sign on her behalf. (HT, p. 130.) She further testified that she personally reviewed every LCA before it was put in the public access binder and that she has never seen an unauthorized signature on any LCA. (HT, p. 130.) Since the LCAs are prepared under her direction and signed with her authorization, the fact that she did not personally sign each LCA does not make the use of her authorized signature instead of her actual signature a material misrepresentation of fact.

The Complainant also alleged that the Respondent continued to hire H-1B employees and to have the visas of current H-1B workers renewed throughout 2001 despite its knowledge that comparable companies were engaged in massive reductions-in-force. He also alleged that in nearly all job classifications for which the Respondent applied for LCAs in 2001, a similarly employed U.S. worker lost his or her job in the same classification and that the Respondent was replacing U.S. workers with H-1B workers. The Complainant alleged that based on these factual allegations, the Respondent made a misrepresentation as to a material fact when it indicated in LCAs filed on December 7, 2000, for Sunnyvale, Complainant's Exhibit 19, and May 29, 2001,[7] for Santa Clara that employment of H-1B workers would not have an adverse effect on the working conditions of workers similarly situated in the area of intended employment. The Complainant asserted that this was a material misrepresentation because U.S. workers were laid off while H-1B workers were retained in the RIF.

The attestation in Complainant's Exhibit 19, and all LCAs, that the H-1B worker being sought will not have an adverse impact on the working conditions of U.S. workers is not a statement that the H-1B workers will not displace U.S. workers. The phrase "working conditions" is a reference to actual working conditions and is described in the regulations as "hours, shifts, vacation periods, and benefits such as seniority-based preferences for training programs and work schedules." 20 C.F.R. § 655.732(a). It is not a statement that U.S. workers will not be displaced.

An attestation that U.S. workers will not be displaced is only required of H-1B dependent employers and employers who have been found to be willful violators of the LCA requirements. Those employers are also required to attest that the employer will recruit U.S. workers before hiring the H-1B workers. 20 C.F.R. § 655.736. The Respondent could only be categorized as an H-1B dependent employer if it met the requirements of 20 C.F.R. § 655.736(a)(1)(iii), which applies to employers with at least 51% of its full time equivalent employees employed in the United States and with H-1B workers comprising at least 15% of those employees in the United States.

The Respondent denies that it is a H-1B dependent employer and indicated on its LCAs that it is not H-1B dependent. (Complainant's Exhibit 17.) Ms. Wilson testified that she was told by Department of Labor auditors after an audit of its payroll records and LCA files that the Respondent is not H-1B dependent. The Complainant has offered no evidence to establish that the Respondent is an H-1B dependent employer. There is also no evidence that the Respondent has been found to

[7] The record does not include a LCA dated May 29, 2001.

be a willful violator. Thus, the Respondent was not required to attest that the H-1B workers would not displace U.S. workers. As the Respondent correctly points out, in *Eva v. Kolbusz-Kijne v. Technical Career Institute*, Case No. 93-LCA-0004 (Jul. 18, 1994), the Secretary stated that the H-1B provisions do not prohibit or prevent employers from hiring H-1B workers where U.S. workers are available and that the H-1B provisions are not intended to remedy the layoff of U.S. workers. *Eva v. Kolbusz-Kijne v. Technical Career Institute, supra*, slip op. at p. 8. Moreover, even if the Respondent was required to make an attestation that U.S. workers would not be displaced, there is no evidence that H-1B workers displaced any U.S. workers at the Respondent's facilities.

The Allegation that Jobs Do Not Meet the Specialty Occupation Requirements

The Complainant alleged in his February 25, 2002, complaint that the "IR System Technologist I and 2" positions identified in some of the Respondent's LCAs do not meet the requirements for "specialty occupations." The determination of what constitutes a "specialty occupation" falls within the authority of the Immigration and Naturalization Service, not the Department of Labor. 20 C.F.R. § 655.715. Thus, I have no jurisdiction to consider the merits of this allegation.

Violations Found

In conclusion, I find that the Respondent failed to properly post the LCAs by failing to post two copies of the LCAs at the specific work site the H-1B workers would be working at. While the Respondent did post two copies of the LCA, the regulations require that both copies be posted at the actual work site. The Respondent was not precluded from posting a copy of the LCA at its corporate headquarters, but that posting could not take the place of the second LCA posting at the work site.

I must now determine whether the Respondent's failure to properly post two copies of the LCA was a substantial or willful failure to comply with the LCA regulations. The regulations define "willful failure" as "a knowing failure or a reckless disregard with respect to [the INA], or §§ 655.731 or 655.732. See *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); see also *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985)." 20 C.F.R. § 655.805(c)

Because the specific violation I found was not one alleged by the Complainant, the Respondent did not address the question of whether this particular conduct should be categorized as being willful. However, in response to the Complainant's request that the Respondent be found to be a willful violator, the Respondent, citing *McLaughlin v. Richland Shoe Co*, argued that the conduct must be deliberately intended to violate the law before it can be deemed to be willful. The Respondent also argued that deference should be given to the Administrator's finding that the posting violations the Administrator found were not deemed to be willful violations.

In assessing whether the Respondent's violation was willful or not, I find it significant that the Respondent did post two copies of the LCAs. Its deficiency was in failing to post both copies of the LCAs at the actual worksite where the H-1B workers would be working. Ms. Wilson testified that every LCA was posted at the corporate headquarters so that the Respondent's employees who

were interested would know the all of the postings, and not just individual, job-site specific ones. (HT, p. 148.) She also testified that she discussed the practice of posting one LCA at the job site and one at the corporate headquarters with the Department of Labor investigator and that the investigator had no problems the practice. (HT, p. 148)

I find that the Respondent's violation of the LCA posting requirements was not willful. While a failure to post any LCA whatsoever would be a willful violation, I do not find a willful violation in this situation where notices were posted, and the deficiency is in the failure to post the second notice at the actual worksite.

I also find that the Respondent's violation of the posting requirement was not a substantial one. While the regulations provide a definition for what constitutes a "willful violation" of the regulations, they do not offer a definition for what is deemed to be a "substantial violation." The "substantial compliance rule" is defined by Blacks Law Dictionary 1280 (5th ed. 1979) as "compliance with the essential requirements, whether of a contract or of a statute." In this instance, the Respondent did comply with the essential posting requirement to post two notices and actually posted one notice at the worksite. It merely posted the second notice in the wrong place because the posting at the corporate headquarters did not satisfy the requirements of the regulations.

I also find that the Respondent denied the Complainant public access to the LCA public access files between March 31, 2002, and July 29, 2002, but that the violation was not substantial or willful. The Complainant had access before March 31, 2002, and was given access again after the Respondent was told it could not deny the Complainant access.

Appropriate Remedy

Civil money penalties can be assessed for violations of the LCA regulations. 20 C.F.R. § 655.810(b). The regulations provide that in determining the amount of the civil money penalty to assess, the Administrator shall consider the type of violation committed and other relevant factors, including the prior history of the violation or violations, efforts made to comply with the provision, the explanation for the violation, the employer's commitment to future compliance and the extent to which the employer achieved a financial gain due to the violation or the potential financial loss, potential injury or adverse effect with respect to other parties.

However, 8 U.S.C. §1182(n)(2)(C) provides that civil monetary penalties are to be assessed for a failure to post the LCAs only if the failure to post the LCA is found to be a substantial violation of the requirement. In this instance, I have determined that since there were two notice posted, and one was in the proper place, there was no substantial violation of the posting requirement. Thus, no civil money penalties are appropriate for the Respondent's failure to post two copies of the LCA at the actual worksite. I note, though, that if civil monetary penalties were considered, there is no evidence that the Respondent has a history of prior violations, and the Respondent achieved no financial gain through its failure to post two copies of the LCA. Also, the Administrator ordered the Respondent to post the LCAs at Sunnyvale, California, and Austin, Texas, where the Respondent failed to post the LCA, and that has already been accomplished.

While no monetary penalties are assessed, it is appropriate, however, to order the Respondent to modify its LCA posting practices to require that the LCAs be posted at two conspicuous locations at the actual worksite the H-1B worker(s) will be working at. The Respondent may continue to post the LCAs at its corporate headquarters, but that posting cannot be considered one of the two required postings.

I also conclude that no civil money penalty is warranted for the Respondent's failure to give the Complainant access to the LCA documents for that 3-month period. Ms. Wilson, after denying him access, promptly checked into whether her action was appropriate. While it would have been better if she had checked into its appropriateness before denying him access, her decision to deny the Complainant access was prompted by concerns expressed to her by other individuals, and she did remedy the situation after she learned she could not deny the Complainant access. Moreover, the Complainant had access before and after the 3-month period.

ORDER

Based on my findings above, the Administrator's decision is MODIFIED to add a finding that the Respondent failed to comply with the LCA posting requirements by failing to post two copies of the LCA at the actual worksite the H-1B workers would be working at and a finding that the Respondent failed to comply with the requirement to provide public access to the LCA public records when it denied the Complainant access to those records between March 31 and July 29, 2002, and that neither of these violations to be substantial or willful and assess no civil money penalties.

The Respondent is ORDERED to change its posting practices with regard to the LCA applications to post copies of the LCA in two conspicuous locations at the actual worksite the H-1B worker(s) will be working at.

JENNIFER GEE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 55.845, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within thirty calendar days of the date of this decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge.