



In the Matter of:

**U.S. DEPARTMENT OF LABOR,
ADMINISTRATOR, WAGE & HOUR
DIVISION, EMPLOYMENT STANDARDS
ADMINISTRATION,**

**ARB CASE NOS. 00-020
00-021**

ALJ CASE NO. 96-ARN-3

COMPLAINANT,

DATE: August 30, 2002

v.

ALDEN MANAGEMENT SERVICES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances

For the Complainant:

Ellen R. Edmond, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., *U.S. Department of Labor, Washington, D.C.*

For the Respondent:

Neil P. Stern, Esq., *Laner, Muchin, Dombrow, Becker, Levin & Tominbert, Ltd., Chicago, Illinois*

DECISION AND ORDER OF REMAND

This case arises under the Immigration Nursing Relief Act of 1989 (INRA or the Act), 8 U.S.C. §§ 1101(a)(15)(H)(i)(a) and 1182(m) (West 1999). We are asked to decide significant additional issues to those recently addressed in *U. S. Department of Labor v. Beverly Enterprises, Inc.*, ARB No. 99-050, ALJ No. 98-ARN-3 (ARB July 31, 2001). The Respondent, Alden Management Services, Inc. (hereinafter AMS or Alden), has filed a Petition for Review, which requests this Board to examine the ALJ's Decision and Order (D. & O.) of November 19, 1999. This Order incorporated an earlier Interlocutory Order Granting in Part Administrator's Motion for Summary Judgment (I.O.). The Administrator, Wage and Hour Division, U. S. Department of Labor (Administrator) also has petitioned for review of the Decision and Order. The Administrative Review Board (Board) affirms the ALJ's holdings that the Department of State telegram is a "complaint," that the Department of State is an "aggrieved person or organization," that AMS is a "facility," and that the Administrator had "reasonable cause" to investigate AMS. We also affirm the ALJ's decision that the Secretary of Labor has the authority to conduct "directed investigations" and that prosecution of this case was not barred by the 180-day limitation for investigation and determination. Moreover, the Board concurs in the ALJ's holding that AMS must pay its H-1A

nurse employees the wage rate for similarly employed registered nurses at its facilities. However, we reverse the ALJ's decision that the period for calculating the back wages owed to the nurses is limited to one year, and, we therefore remand this case for further proceedings consistent with this decision.

BACKGROUND

The Administrator and AMS filed "Joint Stipulations" (JS) consisting of seventy-nine paragraphs. We shall refer to this exhibit by paragraph number. The record also contains twenty-five exhibits ("Ex" marked "A" through "Y"). Depositions are also part of this record. We proceed to summarize the factual background underlying this dispute.

Alden Management Services, Inc. is an Illinois corporation in the business of furnishing services to nursing homes. Alden provides financial services and support, payroll and accounting assistance, regulatory and licensing advice, and insurance claim processing. It also provides nursing, dietary and maintenance personnel, and advice in employment matters such as recruiting, hiring, and discipline. JS 1,4.

This matter involves Alden's relationship with seven Illinois nursing homes ("facilities" or "affiliates" of AMS) to which it provides the above-mentioned services. Each of the affiliates is licensed in Illinois to provide skilled nursing care to the resident patients at their nursing home facilities. Five of the facilities are separately incorporated nursing homes but owned by AMS. AMS President Floyd Schlossberg and Secretary /Vice President Joan Carl are also President and Secretary, respectively, of each of the seven facilities. Each facility executed a written contract with AMS. JS 7-12.

In 1992, AMS became aware of the H-1A program for the temporary importation of foreign nurses to alleviate the national shortage of registered nurses. In order to participate in the program, AMS filed "Health Care Facility Attestations" with the United States Department of Labor, Employment and Training Administration in 1992, 1993, 1994, and 1995. AMS recruited nurses from the Philippines with the assistance of its agent, Fely Balabagno, and entered into contracts with the nurses. JS 16-27; Ex C, D, E, F, G. After AMS filed Petition[s] for Nonimmigrant Worker[s] with the U.S. Immigration and Naturalization Service, visas were issued for the nurses and they came to work at the seven Alden facilities from 1992 through 1995. JS 28-32; EX H, I. However, until each nurse received a license to practice registered nursing in Illinois, they were employed at the facilities as Certified Nurses Aides ("CNAs"), and/or Registered Nurses License Pending ("RNLPs"). They were paid less than the hourly rate earned by registered nurses ("RNs") at the facilities until they received the Illinois license. JS 33, 41-45; Ex L.

In April 1995 the U. S. Department of Labor, Wage and Hour Division, received a telegram from the U. S. Department of State ("State Department") with information concerning Alden's H-1A activities. Ex J. The telegram was referred to Wage and Hour's Chicago District Office and an investigation regarding Alden's compliance with INRA's attestation process was started. JS 34-37, 69-75. On April 3, 1996, the Administrator issued a "Determination Letter" stating that a basis existed for a finding that AMS, in two of the attestations, had misrepresented itself as being a

“facility” under the Act and the regulations.¹ These two attestations were effective from June 11, 1993 to June 13, 1995. Ex D, E. The Administrator also determined that in the same two attestations AMS had misrepresented that it was operating a training program designed to recruit and retain U.S. nurses. For each of these material misrepresentations the Administrator assessed a civil money penalty of \$14,000. The Administrator also found that AMS had failed to perform a condition of the two attestations by not paying 119 of the alien nurses the prevailing wage rate paid to other registered nurses similarly employed at its facilities. For this violation the Administrator calculated and assessed AMS a back wage liability of \$787,734.80 and a civil money penalty of \$119,000. Finally, the Administrator assessed a \$7000 civil money penalty when she determined that AMS and its facilities had failed to make some of its nurses available for questioning by investigators. JS 38; Ex K. AMS requested a hearing before an Administrative Law Judge pursuant to 29 C.F.R. § 655.420.

JURISDICTION AND SCOPE OF REVIEW

The Board has jurisdiction over both Petitions for Review pursuant to 20 C.F.R. § 655.445(a) (2001).² This Board has authority to review the ALJ’s findings of fact and legal conclusions *de novo*. 5 U.S.C. § 557(b)(West 1996). *See also Whitaker v. CTI-Alaska, Inc.*, ARB No. 98-036, ALJ No. 97-CAA-15, slip op. at 3 n.4 (May 28, 1999) (ARB’s authority to review summary judgment recommendations *de novo*).

ISSUES PRESENTED

In *U. S. Department of Labor v. Beverly Enterprises, Inc.*, ARB No. 99-050, ALJ No. 98-ARN-3 (ARB July 31, 2001), the Board held that the Administrator was authorized to conduct so-called directed investigations without a complaint from an aggrieved person where she has reason to believe that a violation of INRA has occurred. The Board also held that the State Department was an aggrieved person and that the telegram it sent to the Department of Labor was a complaint. We decided that the Administrator was not limited to 180 days in investigating and determining whether a facility had met conditions of its attestation. *U.S. Department of Labor v. Beverly Enterprises, Inc.*, ARB No. 99-050, ALJ No. 98-ARB-3, slip op. at 10, 11, 16, 17.

The Board has been asked to decide seven issues, three of which, however, were addressed and decided in *Beverly*. Therefore, we will deal summarily with those matters. First, AMS asserts that the U. S. Department of Labor lacks jurisdiction to make determinations and assess back pay

¹ The Administrator’s determination was based on a finding that Alden did not meet the first sentence of the definition of facility contained in 20 CFR § 655.302. We find, as set forth *infra*, that Alden did, however, fit within the second sentence of the regulatory definition. We also find that Alden was a facility for additional reasons discussed *infra*.

² Although this section of the INRA regulations still refers to review by the Secretary of Labor and requires documents to be filed with the former Office of Administrative Appeals, Secretary’s Order No. 2-96 delegated authority to the Board to act for the Secretary on petitions for review under INRA. Secretary’s Order No. 2-96, § 4c (20); 61 Fed Reg. 19978 (May 3, 1996).

liability and civil money damages against it because the State Department telegram did not constitute a “complaint” by an “aggrieved person or organization” about a “facility.” Respondent’s Statement in Support of Petition for Review at 12-14. *See* 8 U.S.C.A. § 1182(m)(2)(E)(ii). AMS, therefore, asked the ALJ to dismiss the Administrator’s determination and assessments. The ALJ denied this portion of AMS’s Motion to Dismiss, finding that the telegram was a complaint and that the State Department was an aggrieved person or organization. I.O. at 5-6. We affirm that decision and, as discussed *infra*, hold that the State Department telegram is a “complaint.” Moreover, applying the same rationale that was employed in *Beverly*, we hold that the State Department is an “aggrieved party.” *U.S. Department of Labor v. Beverly Enterprises, Inc.*, ARB No. 99-050, ALJ No. 98-ARN-3, slip op. at 10-17. The issue of whether AMS is a “facility” is discussed fully below.

The Board is again asked to determine whether a State Department telegram to the U. S. Department of Labor concerning an H-1A facility is a “complaint.” The Board concluded that the telegram at issue in *Beverly* was a “complaint” under INRA. We apply the same analysis here. *See U.S. Department of Labor v. Beverly Enterprises, Inc.*, ARB No. 99-050, ALJ No. 98-ARN-3, slip op. at 11-12.

The Secretary’s regulations implementing INRA describe a “complaint:”

No particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint. The complaint shall set forth sufficient facts for the Administrator to determine what part or parts of the attestation or regulation allegedly have been violated.

29 C.F.R. § 655.405(b).

As discussed more fully below in our analysis of whether the Administrator had reasonable cause to investigate AMS, the contents of the telegram are about Alden and, as the ALJ described, “potential violations” of INRA. The telegram relates information received by State Department investigators that the Alden facilities may not be experiencing a nurse shortage and that Alden may be using H-1A visas to “stockpile” the Philippine nurses. Ex J para. 4, 6. This written information relates directly to conditions to which AMS attested and suggests, at least, possible violations of those conditions. *See* Para. 8.a. (ii) in Ex D and E; para. 8.d. (ii) in Ex D and para. 8.d. (i) in Ex E. We find that the State Department telegram falls clearly within the description given in the regulation cited above, and conclude that it is, therefore, a “complaint.”

AMS also contends that if the Board were to conclude that the telegram was not a complaint and the State Department not an aggrieved person or organization, the Administrator could not proceed to make determinations and assessments against it because she lacks the authority to conduct so-called “directed investigations.” Respondent’s Statement in Support of Petition for Review at 18-21. The ALJ held that, even absent a complaint, the Administrator is authorized to “initiate an

investigation of a facility's compliance with the Act." I.O. at 7. Therefore, the ALJ denied AMS's motion that dismissal for lack of jurisdiction was appropriate. We concur. The ALJ correctly relied upon a Department of Labor regulation in concluding that the Administrator has the authority to investigate in the absence of a complaint: "[t]he Administrator, *either* pursuant to a complaint or *otherwise*, shall conduct such investigations as appropriate..." 20 C.F.R. § 655.400(b) (emphasis added). For the reasons we set forth in *Beverly* we hold here that "the words 'or otherwise' in the regulation authorize 'directed investigations,'" *Id.* at 10.

Finally, this Board summarily disposes of another of AMS's jurisdictional arguments. AMS contends that enforcement of INRA is barred here because the Determination Letter (Ex K) was not provided within 180 days from the filing of the complaint as required by the Act. Respondent's Statement in Support of Petition for Review at 24-25. *See* 8 U.S.C.A. § 1182(m)(2)(e)(iii); 20 C.F.R. § 655.405 (c), (d). The ALJ disagreed and held that the statutory 180-day limitation is "directory rather than jurisdictional," and he therefore denied AMS's request for dismissal on this ground. Again, we agree with the ALJ and hold that the investigation and issuance of a determination more than 180 days after the Department of Labor received the State Department telegram did not bar the prosecution of this case. *See U.S. Department of Labor v. Beverly Enterprises, Inc.*, ARB No. 99-050, ALJ No. 98-ARN-3, slip op. at 17-19.

The remaining issues to be decided are:

1. Whether Alden Management Services, Inc. is facility for purposes of INRA.
2. Whether the Administrator had reasonable cause to conduct an investigation of AMS.
3. Whether the period of time for calculating back pay awards under INRA is limited.
4. Whether AMS is required to pay the H-1A nurses the wage rate for registered nurses similarly employed at its facilities.

DISCUSSION

1. AMS Is A Facility.

INRA was established to provide relief for the nursing shortage crisis by enabling U. S. healthcare facilities to employ qualified nonimmigrant aliens as registered nurses for a limited period of time. The statute sets forth the procedure by which health care facilities could seek temporary admission to the United States for these so-called H-1A nurses. 20 C.F.R. § 655.300. As a first step, the facility had to submit a written attestation, Form ETA 9029, to a regional office of the Employment and Training Administration (ETA) of the Department of Labor. The attestation required the Chief Executive Officer of the facility to declare under oath that information contained therein is true and correct. The information, in summary and relevant part, pertained to the name, type of facility, its address, federal employer identification number, and phone number. The facility

also had to attest that it intended to petition for H-1A nurses, that it had not laid off any registered nurses in the past year and, through no fault of its own, there would be a “substantial disruption . . . in the delivery of health care services of the facility without the services of such an alien or aliens.” Furthermore, the facility had to declare that employing the alien nurses would not “adversely affect the wages and working conditions of registered nurses similarly employed,” and that the alien nurse would be paid the “wage rate for registered nurses similarly employed.” Finally, the facility had to also attest that it was taking “timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens . . . in order to remove as quickly as possible the dependence of the facility on nonimmigrant nurses” 8 U.S.C.A. § 1182(m)(2)(A). *See, e.g.* Ex C (Form ETA 9029).

After filing the attestation with ETA, the health care facility was then required to file visa petitions with the Immigration and Naturalization Service (INS) for admission of the alien nurses to the United States. This task was accomplished by completing INS Form I-129, Petition for a Nonimmigrant Worker (I-129) wherein the health care organization’s representative certified under penalty of perjury that the information submitted was true and correct. The petition requested general information about the employer, the requested nonimmigrant classification for the person seeking admission (“H-1A” in this case), information about the person to be employed, and information about the proposed employment (*e.g.*, “professional nurse in nursing home”), the wages per week, and whether the position was full or part-time. 20 C.F.R. § 655.301(c); Ex H (INS Form I-129).

The Administrator of the Department of Labor’s Wage and Hour Division, as the Secretary of Labor’s designee, performs the Secretary of Labor’s investigative and enforcement functions under INRA. 29 C.F.R. § 655.400(a). The Act requires the Secretary to “establish a process for the receipt, investigation, and disposition of complaints respecting *a facility’s failure to meet conditions attested to* or a facility’s misrepresentation of a material fact in an attestation.” Furthermore, if the Secretary “finds, after notice and an opportunity for a hearing, that *a facility (for which an attestation is made) has failed to meet a condition attested to* . . . [she will notify the Attorney General and impose administrative remedies and appropriate civil money penalties].” 8 U.S.C.A. § 1182(m)(2)(E)(ii), (iv). Thus, it is a “facility” which is required to attest, petition, and be accountable under the INRA attestation and enforcement processes. The definition of “facility” is established in a regulation implementing the Act:

Facility means a user of nursing services with either a single site or a group of contiguous locations at which it provides health care services. “Facility” includes an employer of registered nurses which provides health care services in a home or other setting, such as a hospital, nursing home, or other site of employment, not owned or operated by the employer (*e.g.*, a visiting nurse association or a nursing contractor).

20 C.F. R. § 655.302.

AMS asserts that since it is neither a “user of nursing services” nor an “employer of registered nurses,” it cannot be a “facility,” and therefore the Administrator had no authority under INRA’s enforcement scheme to determine that AMS was liable for any violations of the Act. AMS contends that since it is not a “facility,” the ALJ erred in denying its Motion to Dismiss for lack of jurisdiction. Additionally, AMS asserts that the ALJ erred in granting summary judgment on the issue of whether it is a “facility” since genuine issues of material fact exist as to its relationship with the affiliated health care centers, which, AMS argues, actually employed the nurses and should be held liable for the violations.

The ALJ reasoned that the statute clearly equates an H-1A visa “petitioner” with “facility.” Furthermore, the implementing regulations, in effect, equate “facility” with an entity submitting an attestation. *See* 8 U.S.C.A. § 1101(a)(15)(H)(i)(a); and 20 C.F.R. § 655.310(a). He therefore held that AMS is a “facility.” I.O. at 7. Without elaboration or citation to authority, the ALJ also concluded that AMS was estopped from denying its status as a “facility,” a conclusion joined by the Administrator who cites *Technicon Med. Info. Sys. Corp. v. Green Bay Packaging, Inc.*, 687 F.2d 1032 (7th Cir. 1982), *cert. denied*, 459 U.S. 1106 (1983), as authority for this estoppel theory. I.O. at 7; Administrator’s Response to AMS’s Petition for Review at 6.

AMS undertook the attestation and visa petitioning processes required by INRA and thereby brought the alien registered nurses into the United States for its benefit. JS 17-24, 28-31. Because it engaged in these activities, we conclude that AMS is a “facility.” Our analysis of whether AMS is a “facility” begins by examining its attestations.

AMS, through its designee, Joan Carl, executed four “Health Care Facility Attestations.” Ex C, D, E, F. Carl, as “Chief Executive Officer,” signed each of the attestations in the “Declaration of Facility” section of the form. By doing so she “declared under penalty of perjury that the information” is true. The information Carl provided included: 1) that Alden Management Services, Inc. was the Name of the Facility; 2) that Alden had a federal identification number which she provided in the space for the Facility’s Federal Employee I. D. Number; 3) that, under “Kind of Facility,” Carl attested AMS was either an “Other Facility intending to petition for H-1A nurses” (Ex C, D), or a “Facility (hospital, nursing home, clinic, household, etc.) intending to petition for H-1A nurses” (Ex E, F); and, 4) that “This Facility has not laid off any registered nurse . . .,” and “Through no fault of this facility, there would be a substantial disruption in the delivery of health care services of the facility . . .” (emphasis supplied). AMS, therefore, unequivocally declared it was a “facility” when it executed each of the attestations.

Even more consequential, however, is the fact that AMS filed these attestations with the Department of Labor ETA. JS 17-24. The Act’s regulations are explicit as to who may file (“submit”) attestations. Only an entity that meets the definition of a “facility” may submit an attestation to the U.S. Department of Labor ETA Regional Office that has jurisdiction over the geographic area where the H-1A nurse will be employed. *See* 20 C.F.R. § 655.310(a). The attestations dated May 28, 1993 (Ex D) and June 2, 1994 (Ex E) are the attestations cited by the Administrator as evidencing violations of the condition to pay H-1A nurses the wage rate for similarly employed registered nurses. By submitting these two attestations to ETA, AMS therefore

accepted the designation of “facility” and incurred the consequences thereof, to wit, the Administrator’s authority to investigate and determine violations of the Act.³

AMS also took the next step necessary for securing the admission of nonimmigrant nurses under INRA. It filed visa petitions for the admission of H-1A nurses with the Immigration and Naturalization Service (INS). 20 C.F.R. §§ 655.301(c), 655.310(m)(1). AMS filed its visa requests using Form I-129-Petition for Nonimmigrant worker (I-129) with the INS office in Lincoln, Nebraska, and H-1A visas were issued for the Philippine nurses. JS 28-31. Ex H, I.

As a consequence of petitioning for H-1A visas and then filing the I-129s, AMS also became a “facility” by virtue of the clear language of 8 U.S.C.A. § 1101(a)(15)(H)(i)(a): “facility shall include the petitioner ...” The Board therefore agrees with the ALJ and concludes that AMS is a facility because it was an INRA petitioner for nonimmigrant nurses and filed its visa requests with INS.

Furthermore, we believe that an additional basis exists for concluding that AMS is an INRA “facility.” We find that the record contains uncontroverted evidence that AMS was a “nursing contractor” and therefore a “facility.” “‘Facility’ includes an employer of registered nurses, which provides health care services in a home or other setting, such as a hospital, nursing home, or other site of employment, not owned or operated by the employer (*e.g.*, a visiting nurse association or a *nursing contractor*.)” 20 C.F.R. § 655.302). (emphasis supplied). A “nursing contractor” is defined as “an entity that employs registered nurses and supplies these nurses, on a temporary basis and for a fee, to health care facilities or private homes.” 20 C.F.R. § 655.302.

Each of the nonimmigrant nurses for whom the Administrator seeks back pay executed a “Nursing Home/Nurses’s Agreement” with the “Facility.” Some of the agreements designated AMS, Inc. as the “Facility;” others named AMS, Inc. together with one of its nursing care affiliates (*e.g.*, “Alden Nursing Center Poplar Creek”) as the “Facility.” The Board finds that these agreements were employment contracts. The agreements provide that the “Facility does agree to initially employ the Nurse ...,” and “the Facility agrees to pay the Nurse an hourly entry level rate of ...,” and “[t]he facility agrees to supply the Nurse with the same medical/dental insurance plans, social security and other fringe benefits ...[as other employees].” JS 27; Ex G; Deposition of Joan Carl, p. 108-109, 111. Thus, AMS employed the nurses.

AMS also entered into contracts (“Agreement to Provide Financial Management and Operational Support to a Long Term Care Facility”) with each of its seven health care/nursing center affiliates. JS 8; Ex A. Joan Carl, AMS’s Secretary and Vice President, described one of the services AMS provided to the affiliates as part of these agreements: “Alden management acted as a central location to do the paperwork and to channel or funnel the nurses to the particular facilities.” Deposition of Joan Carl, p. 42, line 9-11. Furthermore, the contract provided that the health care

³ We believe the Administrator’s April 3, 1996 Determination Letter, Ex K, mistakenly confuses an attestation dated April 22, 1994 (not April 24, 1994 as specified in the Determination Letter) with an attestation dated June 2, 1994 (Ex E). The latter document supplemented the earlier attestation, which appears to have been filed with but not accepted by ETA. Other than the dates indicating Carl’s signature, the documents are identical. See JS 22.

outlets would pay AMS a fee for services it, AMS, performed. Ex A. Thus, we find no genuine issue of material fact as to whether AMS employed the nurses and supplied them to the health care facilities for a fee. The Board concludes that AMS was a “nursing contractor” and therefore a “facility.”

Moreover, we find that as a consequence of these actions, AMS secured the benefits which the Act makes available to a “facility,” namely, the permission for alien registered nurses to provide services as its employees. We therefore accept the Administrator’s argument, and adopt the ALJ’s conclusion, that AMS is estopped from denying that it is a facility. See *Technicon Med. Info. Sys. Corp. v. Green Bay Packaging, Inc.*, 687 F.2d 1034. See also *Johnson v. Georgia Dept. of Human Resources*, 983 F. Supp. 1464, 1470 (N. D. Ga. 1996) (a party advocating two sharply contradictory positions “will not be permitted to ‘speak out of both sides of h[is] mouth with equal vigor and credibility before this court.’”) (quoting *Reigel v. Kaiser Foundation Health Plan of North Carolina*, 859 F. Supp. 963, 970 (E.D.N.C. 1994) Cf. *New Hampshire v. Maine*, 532 U.S. 742 (2001), *reh’g denied*, 122 S. Ct. 10 (2001) (“[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.”) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)) (applying judicial estoppel).

In summary, the Board has before it stipulated facts that AMS participated in both the INRA attestation and the H-1A visa petition processes. Therefore, for the reasons discussed above, we conclude that, by operation of law, AMS assumed the designation of “facility.” Furthermore, because AMS operated as a “nursing contractor,” it is, by definition, a “facility.” Finally, because it took the position that it was a facility and thereby secured the benefits of being a facility, we determine that it is estopped from now taking a contrary position. Since we conclude that AMS is a “facility” for purposes of the Act, it is subject to the Department of Labor’s authority to investigate complaints respecting its H-1A attestations.

2. The Secretary Had Reasonable Cause to Believe AMS Failed to Meet the Conditions of its Attestations

As previously described, INRA mandates that the Secretary of Labor, through the Administrator, establish a process for investigating complaints concerning whether a facility has failed to meet the conditions of its attestation or has misrepresented a material fact therein. However, the statute imposes a condition upon the Secretary’s authority. “The Secretary shall conduct an investigation under this clause *if there is reasonable cause to believe* that a facility fails to meet conditions attested to.” 8 U.S.C.A. § 1182(m)(2)(E)(ii). (emphasis added).

AMS urges the Board to find and conclude that the Administrator had no authority to investigate because the Department of State telegram (EX J) did not provide “reasonable cause” to do so. AMS argues, therefore, that since this requisite jurisdictional element did not exist, the Administrator’s determination that AMS violated INRA must be dismissed. Respondent’s Statement in Support of Petition for Review at 14-16. The ALJ found that the Department of State telegram detailed “potential violations” of INRA, which would constitute reasonable cause for an investigation. I.O. at 7. The Administrator contends that the telegram contained sufficient facts for

a determination as to which part of the attestation had been violated, and therefore she had reasonable cause to investigate. Administrator's Response to AMS's Petition for Review at 13-14.

We agree with the ALJ and the Administrator. AMS apparently disputes the factual basis of the ALJ's conclusion that the Administrator had reasonable cause to investigate. However, we find that there is no genuine issue of material fact as to whether the Administrator had reasonable cause to investigate. The contents of the telegram provided reasonable cause to investigate Alden because the contents are *about Alden*, and indicate its attestations might be questionable. The subject matter is startling: "Attempted Bribe by H1-A [sic] Petitioner: Alden Management Services, Inc." Alden, it appears, had been subject to recent State Department scrutiny concerning its employment contracts with Philippine nurses. That issue had been resolved, but now, allegedly, three of Alden's affiliates had given information to State Department personnel indicating that their facilities did not have shortages of RNs. This news contradicted Balabagno, the Alden representative in the Philippines, who was asserting that Alden suffered "critical shortages of R.N.s." Ex J "Subject" and para. 2, 3, and 4. Because of prior "discrepancies" Alden was already suspect. New information about an attempted bribe and inconsistencies about Alden's nurse situation would certainly pique the interest of Wage and Hour professionals and constitute grounds for investigation.

Additionally, Balabagno informed the State Department that AMS was in the process of expanding its Illinois operations and was having "difficulties competing against agencies ... described as 'Nurse Registries.'" *Id.* at para. 5. Alden allegedly had to pay expensive premiums to these "Registries" in order to cover sudden nurse vacancies. Therefore, the State Department telegram comments, "the H1 Petitioner [AMS] appears to be using temporary worker visas [H-1A visas for nonimmigrant nurses from the Philippines] to stockpile a pool of nurses to respond to employment agency type demands [*i.e.*, having to pay high premiums to the nurse registries]." *Id.* at para. 5, 6.

The telegram concludes with a description of Balabagno's attempted bribe and its aftermath. It also relates information received from four Alden nurse applicants claiming they had paid Alden recruiters \$3000-\$4000 and had to pay for their airfare to the United States. In one case, a nurse told the investigator that in 1993 she had arrived in Chicago to begin work with an Alden facility but found the position did not exist. *Id.* at para. 7-9.

AMS argues that though the ALJ found the allegations contained in the telegram could be "potential violations" of the INRA, he did not specify what these violations were and, in fact, the telegram contained "only two even conceivable violations." Respondent's Statement in Support of Petition for Review at 15. However, this Board finds that the contradictory information that the State Department investigators were receiving about Alden's nursing shortage bears directly upon a condition attested to: namely, its sworn declarations in its attestations that there was a current nurse vacancy rate of from 7 to 20 percent. Para. 8.a. (ii) in Ex D, E. The Board also finds that allegations pertaining to "stockpiling" nonimmigrant nurses might very possibly, if true, indicate that AMS was not "taking timely and significant steps designed to recruit and retain registered nurses who are United States citizens or immigrants who are authorized to perform nursing services ...," which is another condition to which AMS attested. Ex D, para. 8.d. (ii); Ex E para. 8.d. (i). We therefore conclude that the ALJ properly rejected AMS's contention that the Administrator did not have reasonable cause to investigate.

Alden posits an additional argument pertaining to the Administrator’s authority to investigate complaints. It contends that, as a matter of law, the Administrator “cannot pursue allegations beyond the scope of the charge;” that is, because the allegations contained in the State Department telegram (the “charge”) did not result in any of the liability determinations eventually made by the Administrator, the ALJ erroneously ruled that it was reasonable for the Administrator to “fully investigate AMS’s compliance with the Act rather than address only those issues raised in the telegram.” Respondent’s Statement In Support of Petition for Review at 19-22; I.O. at 7.

AMS relies upon *G.W. Galloway v. N.L.R.B.*, 856 F.2d 275 (D.C. Cir. 1988) and *Drug Plastics & Glass Co. v. N.L.R.B.*, 44 F.3d 1017 (D.C. Cir. 1995) to support this argument. *Galloway* and *Drug Plastics* involved an interpretation of Section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C.A. § 160(b), which enables the National Labor Relations Board (NLRB) to issue a complaint after receiving a “charge” that an unfair labor practice is occurring or has occurred. The *Galloway* court set aside an NLRB order because there had not been a “necessary connection” between what had been alleged in the charge and then averred in the complaint. “There must be a significant factual relationship between the allegations in the charge and those in the complaint.” *G.W. Galloway v. NLRB*, 856 F.2d at 282. Similarly, the court in *Drug Plastics*, relying upon its holding in *Galloway*, phrased the necessary relationship between an NLRB charge and complaint as being one of “adequate relatedness.” *Drug Plastics & Glass Co. v. NLRB*, 44 F.3d at 1021.

AMS asks us to analogize the NLRB charge-complaint relationship, and the necessary connection that must exist, to the State Department telegram-Labor Department determination letter relationship here where, it contends, no such relationship exists. We are not persuaded.⁴ AMS’s contention that the enforcement provisions of NLRA’s § 160(b) and INRA’s § 1182(m)(2)(E)(ii) are analogous is attenuated. Furthermore, this Board agrees with the Administrator’s position that the court in *Galloway* based its interpretation of Section 10(b) on legislative history and judicial interpretation, and that here, respecting § 1182(m)(2)(E)(ii), there is no comparable interpretation to be gleaned from legislative history or judicial precedent. In fact, as discussed in *Beverly*, we believe that the legislative history underlying INRA indicates that Congress intended that the Administrator have a broad, not limited, authority to investigate potential violations of a facility’s attestations. See *U.S. Department of Labor v. Beverly Enterprises, Inc.*, ARB No. 99-050, ALJ No. 98-ARN-3, slip op. at 5-6 (“Congress expected the Secretary to take action to implement the ‘severe penalty’ provisions of the Act when she receives a detailed statement of alleged violations from a highly credible source such as the State Department ...”). This Board therefore rejects AMS’s argument that the Administrator exceeded the scope of statutory authority when she fully investigated AMS’s H-1A operations after receiving the telegram.

⁴ We reject the NLRB analogy offered by AMS, but also note that it would be logical and reasonable for the Administrator to read the telegram’s allegations that (contrary to its attestation) AMS did not have RN vacancies, and to infer that therefore AMS was employing the alien nurses in non-RN positions and might not be paying them RN wages.

3. An Award of Back Pay Under INRA is Calculated for the Entire Period during which the H-1A Nurse Was Employed by the Facility.

Having found that AMS is a facility and that the Administrator had reasonable cause to investigate, we now examine the propriety of the ALJ's findings and conclusions concerning the amount of back pay to be awarded to the nurses.⁵ Except for AMS's argument concerning the "similarly employed" language of the Act, which we discuss *infra*, there is no factual dispute concerning the circumstances underlying the Administrator's calculation of the back pay award. We briefly reiterate the factual background.

When the Philippine nurses arrived in the United States they were not licensed to work as RNs. They had not taken or passed the Illinois licensing examination. Until the nurses did receive the RN license, AMS employed them as CNAs or RNLPS. While working in those capacities, the aliens were paid less than the hourly wage rate paid to RNs employed at the Alden facilities. Some of the aliens did take and pass the state examination and were reclassified as RNs and paid more than CNAs or RNLPS. The aliens were at all times employed at one or more of the Alden facilities. JS 41-46. The Administrator determined that AMS had violated a condition of two attestations when it paid 119 H-1A nurses less than the wage rate for RNs employed at the AMS affiliates. Ex K. The ALJ agreed. I.O. at 10. Both parties advance arguments concerning the assessment ordered by the ALJ. The calculation of the assessment involves two components: the wage rate to be applied and the time period for which the wage rate applies. We begin with the issue of what time period applies for calculating back pay awards under INRA.

INRA requires a facility to attest that it will pay its H-1A employees the wage rate for "registered nurses similarly employed." 8 U.S.C.A. § 1182(m)(2)(A)(iii). The statute mandates an award of back pay if the employing facility does not comply with this condition. INRA provides:

In addition to the sanctions provided under clause (iv), if the Secretary of Labor finds, after notice and an opportunity for a hearing, that a facility has violated the condition attested to under subparagraph (A)(iii) (relating to payment of registered nurses at the prevailing wage rate), the Secretary shall order the facility to provide for payment of such amounts of back pay as may be required to comply with such condition.

8 U.S.C.A. § 1182(m)(2)(E)(v).

⁵ In addition to awarding back pay, the Secretary may impose civil monetary penalties of up to \$1000 per violation in cases in which she has found a facility has failed to meet a condition of its attestation or misrepresented a material fact therein. 8 U.S.C.A. § 1182(m)(2)(E)(iv). The parties have stipulated as follows: "The parties agree the civil money penalty assessed against AMS, Inc. by the Administrator in the Determination Letter shall be amended to \$40,000.00. AMS, Inc. agrees to pay this penalty amount if the decision with respect to its liability for the violations found by the Court's Order is upheld after concluding its legal appeals." The ALJ accepted the stipulation. Decision and Order dated November 19, 1999 at 2. Therefore, issues pertaining to civil money penalties are not before the Board.]

Because INRA does not contain express language concerning the period for which back pay awards are calculated, the ALJ created such a period. Applying *North Star Steel Co. v. Thomas*, 515 U. S. 29 (1995), he initially looked to similar state statutes and their corresponding statute of limitations. However, he noted that state law is preempted by federal authority in immigration matters and could not, therefore, provide appropriate guidance. Still following the direction of *North Star*, the ALJ chose to “borrow” and apply “far more analogous” federal law, namely, the one-year statute of limitations for filing complaints under the “H-1B” program. D. & O. at 9. The so-called H-1B program is in fact analogous to the H-1A, but instead of nurses, it involves nonimmigrant aliens temporarily employed as fashion models or in “specialty occupations.” Like INRA’s H-1A, the H-1B was enacted to alleviate a temporary shortage of U.S. workers and has similar attestation type requirements and certification procedures. See 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1182(n)(2)(A).

The Administrator had relied upon an internal Department of Labor policy in determining that the back pay calculation was to be measured for two years prior to the receipt of the State Department telegram. Ex K. The Administrator now urges this Board, however, to employ a more generous period. She, too, argues in statute of limitations terminology; namely, that this Board should apply the six year period of limitations specified in 28 U.S.C.A. § 2415(a) which pertains to contract actions brought by the United States. She argues that because the federal government is a party to this INRA proceeding, and because INRA contains no statute of limitations concerning back pay, the more liberal period contained in the contract actions statute should be used.

At this point we hasten to hold that the question of what time limitation, if any, applies to calculating back pay awards under INRA does not involve a discussion or analysis of statutes of limitation. For the reasons set out below, the Board holds that the ALJ erred in finding and concluding that the one-year H-1B statute of limitations applied in this case. The parties are likewise misguided in their arguments as to which statute of limitation this Board should apply.

By deciding to “borrow” the H-1B statute of limitations the ALJ confused time limits for *filing complaints* with time periods for calculating back pay. “Statute of limitations” is the term referring to statutes prescribing the time beyond which a plaintiff may not *bring a cause of action*; generally, a fixed time period within which a *lawsuit must be brought* after a cause of action accrues. See 51 Am Jur 2d 458. “The purpose of such statutes is to keep stale litigation out of the courts. They are aimed at *lawsuits*, not at the consideration of particular issues in lawsuits.” *United States v. Western Pac. R. Co.*, 352 U.S. 59, 72 (1956) (emphasis supplied).

It is not unusual for federal statutes to impose different time limits for filing a complaint and for calculating back pay. For example, Title VII of the Civil Rights Act of 1964 requires that a charge be filed within one hundred eighty days after the alleged unlawful employment practice occurred, but back pay accrues for a period of two years prior to filing the charge. See 42 U.S.C.A. §§ 2000e-5(e)(1), (g). See also 42 U.S.C.A. § 12117(a) (enforcement procedures and remedies under Americans with Disabilities Act incorporate the Title VII scheme.). At least one statute establishes time limits for filing a charge but places no limit on the time for calculating back pay. See 29 U.S.C.A. § 160(b) (an NLRB complaint will not be issued unless the unfair labor practice charge is filed within six months of the alleged practice; the statute is silent as to the time for computing back

pay). *See also Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 190 (2nd Cir. 1991) (“the remedy [under § 160(b)] should be limited to back pay for a reasonable period of time . . .”).

The distinction between a statute of limitations and a time period for calculating back pay is discussed in *Roberts v. Western Airlines*, 425 F. Supp. 416 (D.Cal. 1976). The court analyzed the effect of the 1972 Title VII amendments on the period for recovering back pay. Prior to those amendments there was no time limit in calculating a back pay recovery. Congress added the two-year back pay limitation in the 1972 amendments. The court in *Roberts* explained that though “courts often refer to this period as the applicable statute of limitations, it should be noted that “this [two year] period deals solely with the time for which damages may be recovered, and not the time within which a claim must be filed or else barred.” *Id.* at 420 n. 5.

Having concluded that the ALJ erred in applying a statute of limitations to define the period for assessing back pay under INRA, we now address the proper determination of the time period. When legislation like the Title VII amendments establishes a limit on the period for which back pay may be recovered, that limit, of course, governs. Since INRA does not contain express language establishing the period for back pay recovery, the ALJ and the parties assumed that it does not contain such a limit. This was incorrect. The Act contains a built-in limit on the period of back wage recovery:

The period of admission of an alien under section 1101(a)(15)(H)(i)(a) of this title shall be for an initial period of not to exceed 3 years, subject to an extension for a period or periods, not to exceed a total period of admission of 5 years (or a total period of admission of 6 years in the case of extraordinary circumstances, as determined by the Attorney General).

8 U.S.C.A. § 1182 (m)(4). Since a nurse may not be admitted for more than six years, the maximum period of back pay recovery is thereby six years.

We have reviewed the legislative history of INRA to ascertain whether Congress intended that a narrower time period apply. We find no evidence that Congress so intended. To the contrary, the legislative history supports full recovery of back pay by the nurses. We have already noted that INRA mandates the payment of back pay to H-1A nurses who the Secretary finds have not received the prevailing wage rate for RNs similarly employed. The House Judiciary Committee report on the bill that became INRA pointed out that “the very nature of the penalty structure . . . contemplates maximum flexibility for the admission of aliens under the pilot program and severe penalties for those who fail to meet the terms of the attestation.” 1989 U.S.C.C.A.N. at 1898. Discussing the enforcement provisions of the bill, the report said “the Secretary of Labor may impose administrative or civil money penalties for failure to comply with the terms of the attestation. In the case of a violation of the prevailing wage the Secretary of Labor is required to order the facility to provide back pay.” *Id.* at 1901. By placing the requirement for back pay within the discussion of enforcement provisions, the legislative history indicates that Congress viewed backpay as an enforcement mechanism. The Board is convinced that narrowing the time period for recovering back pay would undermine the intent of Congress that back pay function in that role.

We believe the nurses involved should be made whole, that is, be paid the prevailing wage rate for the entire period of time in Alden's employ. In another context, the Secretary has stated that the "purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have had been in if not discriminated against." *Blackburn v. Metric Constructors, Inc.*, No. 86-ERA-4, slip op. at 8 (Sec'y Oct. 30, 1991)(whistleblower proceeding under the Energy Reorganization Act). See also *Doyle v. Hydro Nuclear Services*, No. 89-ERA-22, slip op. at 2 (ARB Sept. 6, 1996) (ERA whistleblower case); *United States Department of Labor v. Honeywell, Inc.*, No. 77-OFCCP-3, slip op. at 17 (Sec'y June 2, 1993) (nondiscrimination provision under Executive Order No. 11,246).

4. The H-1A Nurses Should Be Paid Back Wages at the Rate of \$13.50 Per Hour, the Stipulated Wage Rate for Registered Nurses Who Were Similarly Employed at the AMS Facilities.

Having determined the time period for calculating back pay awards, the Board turns its attention to the wage rate to be applied. INRA requires that the alien nurse "be fully qualified and eligible under the laws ... governing the place of intended employment to engage in the practice of professional nursing as a registered nurse immediately upon admission to the United States and is authorized under such laws to be employed by the facility." 8 U.S.C.A. § 1182(m)(1)(C). Furthermore, the facility must attest that the "alien employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility." 8 U.S.C.A. § 1182(m)(2)(A)(iii).

Alden represented that each of the nurses for whom it petitioned the INS for an H-1A visa classification would be employed as a full-time registered professional nurse. Ex H. However, as we have discussed, when the nurses arrived in Illinois they were not yet licensed to practice as RNs. They were, therefore, employed by Alden's seven Chicago area facilities as CNAs or RNLPS and were paid less than the prevailing wage rate for RNs unless and until they passed the state examination and were licensed as RNs. JS 41-43. The consequence of this underpayment was the Administrator's determination that a basis existed for finding AMS had not met the attested conditions that it would pay the H-1A nurses the wage rate for RNs. Ex K. The ALJ found that AMS had paid the nurses less than the registered nurse wage rate. He therefore concluded that AMS violated 8 U.S.C.A. § 1182(m)(2)(A)(iii) and is liable for payment of back pay at the rate of \$13.50 per hour, the rate the parties agree was the average entry level wage rate for registered nurses at the Alden facilities. JS 46; I.O. at 10. See 8 U.S.C.A. § 1182(m)(2)(E)(v). We concur in the ALJ's conclusion.

AMS disputes the ALJ's conclusion as to the applicable wage rate on several grounds. Initially it contends that since many of the aliens did not achieve RN status because they were not licensed in Illinois, they do not fall within INRA's definition of nonimmigrant alien ("an alien ... who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 1182(m)(1) of this title [licensed and otherwise qualified to practice nursing in the state of employment]" 8 U.S.C.A. § 1101(a)(15)(H)(i)(a)). Therefore, claims AMS, since the nurses are not covered by the Act, the Administrator did not have jurisdiction to make determinations concerning them. On that basis AMS asks this Board to dismiss the back

pay determinations and its liability for them. Respondent's Statement in Support of Petition for Review at 26.

The Board disagrees with this contention because AMS mischaracterizes the basis for the Administrator's jurisdiction. INRA enforcement authority is founded not upon the employment status of the nonimmigrant alien nurses but upon a facility's compliance with the conditions of its attestation or a misrepresentation of facts therein. 8 U.S.C.A. §§ 1182(m)(2)(E)(ii)-(v). We have already concluded that the Administrator had reasonable cause to investigate whether AMS had failed to meet a condition in two of its attestations. Therefore, regardless of the professional status of the H-1A nurses in Illinois, the Administrator nevertheless had jurisdiction to determine "whether or not a basis exists to make a finding [that a facility has failed to meet a condition of its attestation or misrepresented a material fact therein]." 8 U.S.C.A. § 1182(m)(2)(E)(iii).

Alden posits an additional argument for reversal. The ALJ's granting summary judgment to the Administrator on the issue of Alden's liability for the back pay assessment should be reversed because, Alden contends, a genuine issue of material fact exists, under § 1182(m)(2)(A)(iii), as to the wage rate for registered nurses "similarly employed" by the Alden facilities. A facility is required to attest that "[t]he alien employed by the facility will be paid the wage rate for registered nurses *similarly employed* by the facility." 8 U.S.C.A. § 1182(m)(2)(A)(iii) (emphasis added). AMS asks us to presume the wage rate for nurses "similarly employed" at its facilities would be the wage rate for AMS registered nurses who, for whatever reason, happen to be performing the work of CNAs or RNLPs. Since no evidence exists as to *this* wage rate, there is, argues Alden, a genuine issue of material fact, and this matter must be remanded to the ALJ for a determination of the wage rate. Respondent's Statement in Support of Petition for Review at 29-30.

The Board is inclined to dismiss this argument as sheer sophistry. We have before this Board an organization, which swore under oath (attested) that a disruption of its ability to deliver health care services was imminent. It further declared that it was petitioning for the admission of *registered nurses*, not CNAs or RNLPs, and that it would pay the wage rate for *registered nurses*. It now seeks to avoid the consequences of employing the aliens in non-RN occupations and paying them less than required by statute. In effect, Alden argues that although it admittedly misrepresented how the aliens would be employed, it should nevertheless avoid liability for another misrepresentation and attestation violation -- failure to pay the facility, (and violated its attestation thereby) wage rate for registered nurses. This Board is neither impressed nor persuaded.

Alden's interpretation of the words "similarly employed" cannot convince us because it contradicts the definition contained in the regulations implementing INRA:

Similarly employed means employed by the same type of facility (acute care or long-term care) and working under like conditions, such as the same shift, on the same days of the week, and in the same specialty area.

20 C.F.R. § 655.302.

In essence AMS asserts that there is no evidence of wages paid to registered nurses *who are employed as CNAs or RNLPS*. Alden would have us understand INRA’s “registered nurses similarly employed by the facility” as meaning “registered nurses employed as CNAs or RNLPS.” Under Alden terminology the INRA wage rate requirement is determined according to the *job classification* under which an AMS registered nurse happens to be temporarily assigned.

We find this interpretation contrary to the plain meaning of the words used in the definition of “similarly employed.” The definition clearly indicates that a determination of wage rates for RNs be made according to *where and under what conditions* they work. The Board therefore rejects AMS’s argument concerning the meaning of “similarly employed.” Furthermore, because the parties have stipulated, and the ALJ found, that the average entry level facility rate for registered nurses would be \$13.50 per hour if AMS was found to be responsible for the back pay amounts, we hold that there is no genuine issue of material fact as to the wage rate to be applied in calculating the back pay owed to the nurses herein. *See* JS 46; I.O. at 11.⁶

CONCLUSION

For the foregoing reasons, the Board affirms the ALJ’s conclusions that the State Department telegram is a complaint filed by an aggrieved person or organization. We also affirm his determination that the Administrator has the authority to conduct directed investigations in the absence of a complaint and that the Administrator was not time barred in her investigation and subsequent determinations concerning the Alden attestations. The Board concurs with the ALJ and holds that AMS is a facility for purposes of the Act and that the wage rate to be applied in determining the back pay liability is \$13.50 per hour.

We **REVERSE** the ALJ on the issue of the period for which back pay is to be calculated. Since the Board holds that the H-1A nurses are entitled to an award of back pay for the entire period of their employ at Alden facilities, we **REMAND** this matter to the ALJ for the purpose of calculating the back pay in a manner consistent with this order.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁶ The regulation is entitled to deference, and is dispositive of this issue. However, we also note that even if the regulation did not exist, we would reject Alden’s argument because it is inconsistent with the purpose and requirements of INRA. INRA’s purpose was to relieve the shortage of RNs in the United States. Only RNs could be admitted under its provisions. The Act required the alien to “be fully qualified and eligible ... to engage in the practice of professional nursing as a registered nurse immediately upon admission to the United States” 8 U.S.C.A. § 1101(a)(15)(H)(i)(a); 8 U.S.C.A. § 1182(m)(1)(C). As a consequence, it would be unreasonable to interpret “similarly employed” as pertaining to employment in non-RN positions.