In the Matter of:

UNITED STATES DEPARTMENT OF LABOR, ADMINISTRATOR, WAGE & HOUR DIVISION, EMPLOYMENT STANDARDS ADMINISTRATION,	**ARB CASE NOS. 03-032 03-033**
	ALJ CASE NO. 2001-LCA-29
PROSECUTING PARTY,	**DATE: June 30, 2005**

v.

PEGASUS CONSULTING GROUP, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:
Roger W. Wilkinson, Esq., Paul L. Frieden, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., ***U. S. Department of Labor, Washington, D.C.***

For the Respondent:
Roy D. Ruggiero, Esq., ***Earp & Cohn, PC, Cherry Hill, New Jersey 0***

FINAL DECISION AND ORDER

This matter arises under the Immigration and Nationality Act (INA or Act) H-1B visa program, 8 U.S.C.A. § 1101(a)(15)(H)(i)(b) (West 2005) and § 1182(n) (West 2005), which permits employers to employ non-immigrants to fill specialized jobs in the United States. Under review is the decision of a Department of Labor (DOL) Administrative Law Judge (ALJ) concluding that 14 of 19 Pegasus Consulting Group (Pegasus) computer programmer/analysts were underpaid under the H-1B programs and assessing civil penalties. The Wage and Hour Division (WHD) of the DOL and Pegasus have filed petitions for review. As we discuss, we affirm in part and reverse in part.

BACKGROUND

Under the H-1B program, an employer seeking to hire an alien must submit a Labor Condition Application (LCA) to the DOL. In the LCA, the employer attests that it will pay the H-1B worker "the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question" or "the prevailing wage level for the occupational classification in the area of employment, whichever is greater . . . . " 8 U.S.C.A. § 1182(n)(1)(A)(i)(I)-(II) (West 2005). After the DOL certifies the LCA, the United States Citizenship and Immigration Services (USCIS), known at the time as the Immigration and Naturalization Service (INS), may approve the H-1B petition seeking to employ the non-immigrant worker. § 1101(a)(15)(H)(i)(b). When a non-immigrant enters into employment, it is a failure to meet the condition of § 1182(n)(1)(A) for the employer to fail to pay full-time wages to an employee in non-productive status based on lack of work or the non-immigrant's lack of a permit or license. 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I) (West 2005).

The DOL has authority to investigate complaints, 8 U.S.C.A. § 1182(n)(2)(A); require payment of back wages to H-1B workers, 8 U.S.C.A. § 1182(n)(2)(D) (West 1999); and impose civil money penalties, 8 U.S.C.A. § 1182(n)(2)(C) (West 1999). *See also* 20 C.F.R. § 655.700, 810(a)-(b) (under 1995 and 2000 regulations).[1]

Pegasus was a management consulting company that employed foreign workers in the H-1B visa program to provide software (known to them as "SAP") to automate its customers' business operations. Hearing Transcript (Tr.) 441, 451, 462, 535. In its LCA applications, Pegasus averred that it would pay the higher of the "prevailing wage" or the "actual wage" for each employee at issue. The INS approved the H-1B visas for the employees, Government Exhibit (G) 2-G20. Under employment agreements, Pegasus required each employee to pay a refundable security deposit of about $3,600. The employees arrived between late 1998 and mid-1999. Tr. 250, 346-47; G3, Tabs D & E; G5, Tabs D, E, & J; G7, Tab D; G14, Tab E; G15, Tab D; G17, Tab D; G18, Tabs D & E.

Pegasus experienced a loss of business in early 1999, which resulted in a decision to stop paying ("lay-off") its H-1B workers. Tr. 463-67. It did not notify the INS, however, that they were "terminated," Respondent Pegasus Consulting Group, Inc.'s

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[1] Because the 1995 regulation at 20 C.F.R. § 655.731(c)(5) (1995), requiring an employer to compensate H-1B workers for non-productive time, was declared invalid on procedural grounds, *Nat'l Assoc. of Mfrs. v. United States Dep't of Labor*, Civ. A. No. 95-0715, 1996 WL 420868 (D.D.C. July 22, 1996), *aff'd and remanded on other grounds,* 159 F.3d 597 (D.C. Cir. 1998), we have applied 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I), which is the same as the invalidated regulation. *See* Brief of the Wage and Hour Administrator in Support of her Petition for Review at 3.

Memorandum of Law in Support of Petition for Review (Pegasus Brief) at 29 n.24, and at 30, because of obstacles (an annual cap) in obtaining new H-1B visas.[2] Tr. 445, 709. As of June 1999, Pegasus, relying on prior LCA and H1-B petitions, "reemployed" some of the laid off workers in-house in preparation for an anticipated outside contract. Tr. 483-89. Eventually, when the employment relationships ended, Pegasus conditioned return of the H-1B workers' security deposits on releases of any claim to back wages. Tr. 273, 399-400; G9, Tab E, pp. 84-90; G14, Tab D, J, K; G19, Tab L; G20, Tab P.

After complaints from ten H-1B workers, WHD investigated. Tr. 40. Pegasus furnished documentation showing that 18 of 19 H-1B workers at issue were "on leave without pay," Tr. 73-74; G21, before a number later "resumed active employment." Tr. 75; G21. Documents and interview statements established that the layoffs were not bona fide terminations, because Pegasus failed to notify the INS or to obtain new H1-B visas. Tr. 75, 133, 137, 172, 182-83, 188. The WHD Administrator determined that Pegasus failed to pay $288,218.04 in wages due and owing to 19 of the H-1B workers for non-productive time as mandated under 8 U.S.C.A. § 1182(n)(1)(A), 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I), and 20 C.F.R. § 655.731(c) (1995), and found those violations to be willful and knowing with respect to eight of the employees, and consequently assessed civil penalties in the amount of $40,000.00. Tr. 64-65; Administrative Law Judge (ALJ)-1. Pegasus requested a hearing before the Office of the Administrative Law Judges, *see* 20 C.F.R. § 655.820 (1995), which the assigned ALJ held on January 22, February 26, April 2, and April 3, 2002. He issued his decision, awarding $231,279.41 in back wages and affirming civil penalties of $40,000.00, on November 13, 2002. Both parties appealed.[3]

Issues

On appeal, Pegasus raises the following issues:

1) Whether Pegasus owed back wages to four H-1B workers who testified;
2) Whether Pegasus owed back wages to four H-1B workers who did not testify;
3) Whether Pegasus committed willful violations warranting imposition of civil money penalties.

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[2] When an H-1B employer does not have enough work to pay required wages, the proper procedure is for the employer to "terminate the employment of the H-1B worker, notify the INS, pay the worker's return to his/her country of origin . . . , and no longer be subject to the H-1B program's required wage." 64 Fed. Reg. 628, 647 (Jan. 5, 1999).

[3] Nine of the H-1B workers on whose behalf the Administrator prosecuted below sought to intervene in the appeal, but, because they had not participated as "interested parties," we denied the motion. *Joshi v. Pegasus Consulting Group,* ARB No. 03-034, ALJ No. 2001-LCA-29 (ARB July 29, 2003).

On appeal, the Administrator raises the following issues:

1) Whether miscellaneous payment to H-1B workers must be credited as "wages;"
2) Whether H-1B workers who did not testify are due back wages;
3) Whether H-1B workers who testified that Pegasus did not owe them back wages are due back wages.

STANDARD OF REVIEW

The Administrative Review Board (ARB or the Board) has jurisdiction to review an ALJ's decision. 8 U.S.C.A. § 1182(n)(2) and 20 C.F.R. § 655.845. *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

Under the Administrative Procedure Act, the Board, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(B) (West 1996), *quoted in Goldstein v. Ebasco Constructors, Inc.*, 1986-ERA-36, slip op. at 19 (Sec'y Apr. 7, 1992). The Board reviews the ALJ's decision de novo. *United States Dep't of Labor v. Kutty,* ARB No. 03-022, ALJ Nos. 2001-LCA-10 to 25, slip op. at 4 (ARB May 31, 2005); *Yano Enters., Inc. v. Administrator*, ARB No. 01-050, ALJ No. 2001-LCA-0001, slip op. at 3 (ARB Sept. 26, 2001); *Administrator v. Jackson*, ARB No. 00-068, ALJ No. 1999-LCA-0004, slip op. at 3 (ARB Apr. 30, 2001). *See generally Mattes v. United States Dep't of Agric.*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (rejecting argument that higher level administrative official was bound by ALJ's decision); *McCann v. Califano*, 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's decision by higher level administrative review body).

DISCUSSION

1. Back wages due to four workers who testified

This case turns on whether Pegasus placed the workers "on the bench" in unproductive status, which requires payment of wages, 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I), or whether bona fide terminations occurred, which ends the H-1B wage obligation. Pegasus contends that INS, not DOL has authority to decide whether a termination has occurred. Pegasus Brief at 34-35. The argument has no merit. Because WHD has authority to decide when wages are due, it must be able to determine when an H-1B worker enters or leaves employment. *See* 8 U.S.C.A. § 1182(n)(2)(A).

An employer is obligated to notify the INS of a termination of employment, so that the INS can cancel an H-1B worker's sponsorship. 8 C.F.R. § 214.2(h)(11) (2005). Although not controlling, the 2000 Preamble to 20 C.F.R. Part 655 is instructive. It says:

> [U]nder no circumstances would the Department consider it to be a *bona fide* termination if the employer rehires the worker if or when work becomes available unless the H-1B worker has been working under an H-1B petition with another employer, the H-1B petition has been canceled and the worker has returned to the home country and been rehired by the employer, or the nonimmigrant is validly in the United States pursuant to a change of status.

65 Fed. Reg. 80110, 80171 (Dec. 20, 2000). *Cf.* 20 C.F.R. § 655.731(c)(7) ("Payment need not be made if there has been a *bona fide* termination of the employment relationship. INS regulations require the employer to notify INS that the employment relationship has been terminated so that the position is cancelled (8 C.F.R. [§] 214.2(h)(ii)).").

The evidence establishes that the Administrator and the ALJ correctly found that Pegasus did not effect bona fide terminations, and therefore Pegasus was under an obligation to pay wages to the employees for time periods at issue. For example, after discussions with Pegasus, the affected workers considered themselves to be laid off; they did not believe that Pegasus had terminated their employment. Tr. 275-76, 314-15, 335, 347, 378. As we now discuss, the ALJ correctly concluded that Pegasus violated the payment requirements of H-1B as to four former employees who testified at the hearing: Bikkani Veeraju, Ganapathi Sudeswaran, Jagadish Thosecan, Senthil Nathan.

Bikkani Veeraju

Pegasus defends against its obligation to pay Veeraju on the ground that he was never authorized to come to the United States, and that he never worked at corporate headquarters. Pegasus Brief at 36-41.

However, Pegasus obtained an H-1B visa for Veeraju in accordance with an LCA, G20, Tab A; informed the United States Counsel General in India that it needed his services, Tr. 262, 557; G20, Tab B; entered into an employment agreement with him, Tr. 249-50; G20, Tab C; paid his travel from India, Tr. 251-52, 287, 289-90, 301, 303-04; G20, Tabs E & F; Respondent's Exhibit (R) 8; picked him up at the airport and put him up in a guesthouse, Tr. 302, 518; R8.

From January through August, Veeraju reported for work at the Pegasus office, except for a two-week period in April when he was assigned to a Pegasus client. Tr. 254-55, 257; R8; G20, Tab K. After complaining that he was unpaid, Pegasus gave him two checks for $500, which it called a "Salary Advance," representing the entire amount Pegasus ever paid him. Tr. 256, 258, 267; G20, Tab L; R 8.

Veeraju interviewed with another Pegasus customer in June 1999, but the job did not materialize. Tr. 258-59; R8. He worked in-house for Pegasus in July 1999. Tr. 259-

60, 337-39; G2, Tab D; G9, Tab D, E & M; G14, Tab D & L; G18, Tabs D & F; G20, Tab M. Pegasus did not lead him to believe that his employment was terminated. Tr. 275-76, 314-15. But in September 1999, when Pegasus told Veeraju to leave its guesthouse, he resigned. Tr. 314; G20, Tab O. Almost a year later, Pegasus sent Veeraju a letter stating that he would have to agree that Pegasus owed him no back pay in order to obtain return of his $3,400 security deposit.

The evidence thus establishes that Veeraju was a Pegasus employee and that, as both the Administrator and ALJ concluded, Pegasus owes him back wages. G1, Tab 5; R. D. & O. at 3.

Ganapathi Sudeswaran

Pegasus contends that it has no obligation to pay Sudeswaran back wages, because it terminated his employment and then rehired him. Pegasus Brief at 42. The evidence is otherwise.

Pegasus applied for an H-1B visa for Sudeswaran under an approved LCA. G16, Tab A. Sudeswaran arrived in New Hampshire in October 1998 and worked on two paying projects, but was then taken off the second project because of a dispute between Pegasus and its customer and placed on unpaid, non-productive status from November 29, 1999 through March 15, 2000. Tr. 377, 386-87; G21. During that time, he complained about not being paid, he was never advised that his employment was terminated, and his H-1B visa status did not change. Tr. 377-78, 380, 385-88.

Pegasus recommenced paying Sudeswaran wages on March 16, 2000, when it brought him to New Jersey for training and later placed him on an assignment for a client. Tr. 378-380; G21, G27. Pegasus claimed that Sudeswaran was "on leave without pay" from November 24, 1999, through March 15, 2000. But Pegasus did not prove that a bona fide termination occurred in November 1999. Accordingly, WHD and the ALJ correctly determined that back wages were due and owing. ALJ1; G1, Tab 5; R. D. & O. at 3.

Jagadish Thosecan

Pegasus claimed no obligation to pay Thosecan on the ground that he was never authorized to travel to the United States, and that his employment was terminated. Pegasus Brief at 43-46.

But the evidence established that Pegasus applied for an H-1B visa in accordance with an LCA, Tr. 332; G19, Tab A, and that it paid Thosecan's airfare to a Pegasus customer in San Francisco and put him up in a hotel, Tr. 341-42, 347; G19; Tab D, Tab F. When some glitch developed in the contract, Pegasus placed Thosecan in non-productive status, yet did not inform him that his employment was terminated. Tr. 335, 347; G19, Tab D. Rather, while he was benched from May 3 through July 7, 1999, Thosecan continued to call the office about available work. Tr. 335-36.

In July 1999, Pegasus flew Thosecan to New Jersey, where he lived in a Pegasus guesthouse and worked in-house for a total of $3,400 from July 7 through early October 1999. Tr. 336-8, 349; G19, Tabs D & E. Thosecan worked on an outside contract again from October 1999 through February 2000 and was paid the correct wage. Tr. 340, 347-48: G19, Tabs I & M. After Thosecan resigned in February 2000, Pegasus assessed a $5,000 penalty for short notice and told him to sign a Separation Agreement in which he agreed that Pegasus owed no back pay. G19, Tab L. During the WHD investigation, Pegasus contended that Thosecan was on leave without pay from April 1 through July 15, 1999. G21. The ALJ awarded unpaid wages, and we affirm. R. D. & O. at 4.

Senthil Nathan

Pegasus claimed no obligation to pay Nathan on the ground that he took a voluntary leave of absence. Pegasus Brief at 47.

Pegasus applied for an H-1B visa for Nathan in accordance with an LCA. Tr. 393; G11, Tab A. As of November 1998, he arrived in Michigan and worked on a Pegasus contract, but was then "benched." When he asked about his pay, he was told the company could not afford to pay benched people. Tr. 394-95. Nathan did not take this to be a termination, and Pegasus did not report his H-1B visa to INS as cancelled. Tr. 395. After he started a new assignment in November 1999, Pegasus presented him with an employment agreement that said Pegasus owed him no money. Nathan refused to sign it. Tr. 399-400. Pegasus admits that it did not pay wages to Nathan from September 20 through October 15, 1999, but claims that was because he was on a voluntary leave of absence. Pegasus Brief at 47. Nathan denied being on leave. Tr. 405. The Administrator and ALJ awarded back wages for those weeks. We affirm.

2. Back wages due to workers who did not testify

The ALJ correctly held that "testimonial evidence provides an adequate representative basis to establish a pattern and practice of violation of the Act," R. D. & O. at 5, and accordingly held that some (but not all) of the H-1B workers who did not testify were eligible to recover unpaid wages.

Under labor statutes requiring payment of minimum wages, overtime pay, and prevailing wage rates, it is not necessary for every underpaid employee to testify in order to prove violations that require the award of back wages. Testimony and evidence from representative employees is enough to establish a pattern and practice applicable to all similarly situated employees. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1940) (pattern or practice established with "sufficient evidence to show the amount and extent of that work [performed] as a matter of just and reasonable inference;" burden then shifts to employer to rebut existence of violations "with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence."). *See also Reich v. Southern New England Telecomm. Corp.*, 121 F.3d 58, 67 (2d Cir. 1977); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1298 (3d Cir. 1991); *Cody-Zeigler, Inc. v.*

Administrator, Wage & Hour Div., ARB No. 01-014, 015, ALJ No. 97-DBA-17, slip op. at 8 (ARB Dec. 19, 2003).

The H-1B workers who testified were sufficient to establish a pattern or practice regarding those who did not. Veeraju, Sudeswaran, Thosecan, and Nathan were computer consultants. So were the H-1B workers who did not testify. Pegasus failed to pay "benched" H-1B workers or "laid off" the H-1B workers who testified or failed to pay them when they worked at corporate headquarters rather than for Pegasus clients. The same is true of non-testifying employees. Pegasus claimed no obligation to pay the H-1B workers who did testify on the ground that they were never authorized to come to the United States (Veeraju; Thosecan); that they never worked at corporate headquarters (Veeraju); that they took voluntary leaves of absence (Nathan); or that their employment was terminated (Sudeswaran; Thosecan) and they were re-hired. And it made those same arguments with regard to the workers who did not testify. Pegasus Brief at 24-28.

As the Administrator discusses, there was corroboration for representative testimony on wage deficiencies. Brief of the Wage and Hour Administrator in Response to Respondent's Petition for Review (Administrator's Brief) at 26-27. Contrary to Pegasus's assertions, Pegasus authorized Shailesh Beri's travel and paid his fare. *Id.* Pegasus did not terminate Rajendra Singh's employment in August 1999. *Id.* The statements of Veskastesan Iyengar and Meenakshi Sundararaman overcome Pegasus's assertions that their employment was terminated. *Id.* And Pegasus's acknowledgment that it hired, fired, and rehired Krishnanand Adka, Anupam Kumar, Jitendra Pahadia, Sriram Subramariam, and Srinivas Tangilara supports a finding that the "terminations" were not authentic. *Id.*

Pegasus contends that statements that H-1B workers made during the WHD investigation were erroneously admitted hearsay. Pegasus Brief at 10-23. Although the ALJs have adopted the Federal Rules of Evidence, including those pertaining to hearsay, *see* 29 C.F.R. Part 18, subpart B (29 C.F.R. §§ 18.801-18.806) (2005), the rules of practice governing adjudication of the H-1B program specifically allow consideration of hearsay evidence:

> [A]ny oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18 subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

20 C.F.R. § 655.825(b) (1995).

Therefore, on proof of pattern or practice, it was within the ALJ's discretion and not error to admit witness statements in lieu of their testimony on the basis that, once representative testimony was in the record, additional testimony would have been "unduly repetitive" (i.e., cumulative).

Three of the H-1B workers did not give interview statements to the WHD investigator and also did not testify at trial. They are Sathiyamoorth Koteeswaran, Hanumachastry Rupakala; and Bhaskar Ganguli. Because of that, the ALJ ruled that the Administrator failed to meet her burden of proof with respect to unpaid wages for those H-1B workers. R. D. & O. at 8. The issue we address is whether, notwithstanding their failure to testify or give witness statements, the evidence establishes that those H-1B workers are entitled to unpaid wages.

Here as well the Administrator proved a pattern or practice of violations by Pegasus by means of representative testimony of the four H-1B workers. The Administrator proved that the remaining H-1B workers were not paid for their nonproductive time as 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I) requires. The three workers who neither testified nor gave witness statements were employed as programmer/analysts on client sites, Pegasus claimed they were put on "leave without pay" without bona fide terminations, and they resumed work on client projects using their original H-1B visas. Tr. 259-61, 270, 333-34, 339, 820-21; Exh G2, Tab D; G3, Tabs D & E; G5, Tabs D & E; G7, Tab D; G9, Tabs D & E; G14, Tabs D & L; G15, Tab D; G17, Tab D; G18, Tabs D, E, and F; G21; G23, G24, G27; R15, R18. The H-1B workers and the amounts the WHD determined they are due are: Koteeswaran – $23,323.47; Rupakala – $748.85; and Ganguli – $8,273.07.

In sum, based upon the representative testimony of witnesses, corroborating evidence, and reliable hearsay, the Administrator established the right of non-testifying witnesses to back wages. In addition to the ALJ's ruling, we award back wages to three additional H-1B workers who did not testify.

3. Back wages due to workers who testified they were not owed back wages

We next consider whether Pegasus owes back wages to two H-1B workers who testified that no wages were due and owing to them. They were Neerai Jain and Sridhar Mukunda, both Pegasus employees when they testified.

The ALJ found Jain's testimony not credible, because Jain's job and visa status depended upon Pegasus. R. D. & O. at 6 n. 14. Nevertheless, the ALJ accepted the portion of Jain's testimony in which he said Pegasus did not owe him money, because his employment with Pegasus was terminated, he accepted work with another consulting company, and Pegasus eventually reemployed him. R. D. & O. at 5. Yet the evidence was that there was no bona fide termination for Jain. Pegasus told him they could not pay him, but did not notify him or the INS of the termination of his employment, as INS regulations require, 8 C.F.R. § 214.2(h)(11), and Jain never actually began ("entered

into") employment with the other company, 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I), (II), (III). Tr. 651-52, 816-17, 831, 834. After a layoff, Pegasus put Jain back to work on a consulting project in August 1999. Jain therefore falls into the category of employees who were temporarily laid off (and unpaid) due to lack of work. He is entitled to back pay of $11,736.96, for May 16 through September 5, 1999. Tr. 837-38; Ex. G21, G27.

Similarly, the ALJ believed only the portion of Mukunda's testimony that Pegasus owed him no money. R. D. & O. at 5. But the record shows that Mukunda submitted time sheets to Pegasus, but like the others, was placed on leave without pay, in his case from September 19 through October 31, 1999, then resumed work for Pegasus in November 1999, while under the original H-1B visa. Tr. 788-93, 796, 799, 800-01; Ex. G10, Tab D; G21. We adopt the Administrator's calculation of the amount of the deficiency as $5,769.24.

In short, through representative testimony and records, the Administrator proved that Jain and Mukunda were not on voluntary leaves of absence and that Pegasus did not properly terminate their employment. Therefore, Pegasus must pay the proper wage rate for those nonproductive times.

4. Miscellaneous payments not wages

The Administrator argues that the ALJ improperly gave credit to Pegasus for miscellaneous payments to four H-1B workers as salary advances. Administrator's Brief, at 13-16.

Payments to H-1B workers do not qualify as "wages paid" unless they are:

> (i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for authorized deductions;
> (ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS . . . .

20 C.F.R. § 655-731(c)(2)(i)-(ii) (1995). *See also* 59 Fed. Reg. 65646, 65652-53 (Dec. 20, 1994) (amounts to be treated as "wages paid" shall be paid to the employee free and clear when due).

In this case, Pegasus made payments to four of the H-1B workers that the ALJ credited as "salary advances" toward "wages paid." But they do not qualify as "wages paid" because they were not shown on Pegasus's payroll records and they were not reported to the IRS. Tr. 92. We consequently include the following amounts as due and owing to the following H-1B workers: Veeraju – $1,000; Singh – $1,600; Adka – $3,400; and Tangilara – $400.

5. Willful violations warranting civil penalties

Lastly, we consider whether Pegasus committed willful violations warranting imposition of civil money penalties. The ALJ found that management "knowingly fail[ed] to pay the legally required wages." R. D. & O. at 9.

The Administrator has the authority to impose civil penalties for willful violations of the H-1B requirements. 8 U.S.C.A. § 1182(n)(2)(C); 20 C.F.R. § 655.810(b) (1995 and 2000 regulations). A "willful" violation is a knowing failure to comply or a reckless disregard of whether the conduct complied with 8 U.S.C.A. § 1182(n)(1)(A)(i) or (ii), 20 C.F.R. § 655.731, or 20 C.F.R. § 655.732. *But see McLaughlin v. Richland Shoe Co*., 486 U.S. 128, 133 (1988) (a good faith, but mistaken belief in compliance defeats willfulness).

Pegasus effectively admitted its willful non-compliance when it said that it:

> may have had some general knowledge of its obligations to pay employees, its obligation to notify the INS upon the cessation of an H-1B worker . . . , the obligation to pay H-1B employees while on "the bench," [and] its responsibility to provide transportation to the H-1B employees' country of origin upon cessation of employment.

Pegasus Brief at 49. Although aware of its obligation to pay H-1B workers for non-productive time, *see* Tr. 445, 462, 500, 556, 565, 612, 665, 709, Pegasus rationalized its non-compliance on the basis of lack of funds, Tr. 464-65, 537-38, and then tried to characterize the lay offs as terminations. In addition, Pegasus improperly conditioned return of the H-1B workers' security deposits on a release of any claims to back pay. Tr. 264, 273, 399-400; G9, Tab E. On these facts, we conclude that the violations were willful.

The Administrator imposed civil penalties pertaining to only eight of the workers of $5,000 each (for a total of $40,000), although it found violations regarding 19 workers. We find this to be a moderate exercise of the administrator's authority under the circumstances, as did the ALJ, R. D. & O. at 8, and accept that as the total assessment.

CONCLUSION

The Administrator proved that Pegasus violated the provisions of the H-1B program. Except as aforesaid, we accept the recommendation of the ALJ with regard to the amounts of back wages and civil penalties. In addition, we award the following

amounts to be paid by Pegasus on behalf of the following H-1B workers: Koteeswaran – $23,323.47; Rupakala – $748.85; Ganguli – $8,273.07; Jain – $11,736.96; Mukunda – $5,769.24; Veeraju – $1,000.00; Singh – $1,600.00; Adka – $3,400.00; Tangilara – $400.00.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge