In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,	**ARB CASE NO. 05-032**
	ALJ CASE NO. 2004-LCA-12
PROSECUTING PARTY,	
	DATE: February 28, 2007
v.	
AMERICAN TRUSS,	
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

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

For the Respondent:
Charles S. Caulkins, Esq., Damon A. Colangelo, Esq., *Fisher & Phillips LLP,* Fort Lauderdale, Florida.

FINAL DECISION AND ORDER

This appeal arises under the H-1B provisions of the Immigration and Nationality Act of 1990 (INA), as amended, 8 U.S.C.A. § 1182(n) (2007), and its implementing regulations at 20 C.F.R. Part 655, Subparts H and I (2006). Because the errors raised by the Respondent are either inapposite or waived, we affirm.

BACKGROUND

In 2003, the Wage and Hour Division (WHD) of the United States Department of Labor (DOL) determined that EAS, Inc. d/b/a American Truss (American Truss) had failed to pay five of its H-1B nonimmigrant employees the wages required under the provisions of the H-1B program. After stipulating to the wages it owed four of the workers, American Truss requested a hearing on the wages owed to the fifth. After the hearing, an Administrative Law Judge (ALJ) disposed of several arguments raised by American Truss, and – after finding two errors in the calculations made by WHD – determined that American Truss owed the employee $14.22 more than WHD originally had assessed. Decision and Order (D. & O.) at 6. American Truss timely petitioned for, and we accepted, review.[1] We have jurisdiction under 20 C.F.R. § 655.845,[2] and our

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[1] American Truss sought review of the ALJ's "fail[ure] to take into account multiple errors in [WHD]'s calculations of [the employee's] backpay award." Petition at 3. In addition, American Truss sought "to reiterate all arguments made at the hearing and in the Respondent's Closing Statement" and to "request[] that the Board consider these issues on appeal as well." Petition at 3. In accepting the Petition, however, the Board agreed to review only "[w]hether the ALJ properly calculated [the] backpay award." Notice of Intent to Review at 1 (ARB General Counsel, Jan. 26, 2005). American Truss does not challenge that decision, *see* Respondent's Brief (Brief) at 2, and we here reaffirm it. "By attempting to 'incorporate' all of the arguments it made below, and thus exhorting this panel to conduct a complete review of" the hearing record and its closing statement before the ALJ, American Truss "'invites us to unearth its arguments lodged . . . in [that record and closing statement], leaving it to us to skip over repetitive material, to recognize and disregard any arguments that are now irrelevant, and to harmonize the arguments' it has made at various stages of litigation," and thus "attempts . . . to transfer its duty to make arguments to the judges of this panel." *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1167 n.4 (11th Cir. 2004) (quoting Sixth Circuit decision "explaining the impropriety of the practice [of incorporation] and adopting the position of the First, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits, all of which reject the practice"). Moreover, the regulations governing our review of an ALJ's decision require that a petition for review "[s]pecify the issue or issues in the [ALJ] decision giving rise to such petition" and "[s]tate the specific reason or reasons why the party petitioning for review believes such decision and order are in error." 20 C.F.R. § 655.845(b); *see* 20 C.F.R. § 655.845(e)(1). By "request[ing] that we ferret out and review any and all arguments it made below – without explaining which ones have merit, and where the [ALJ] may have erred," American Truss "clearly runs afoul" of these regulations. *Four Seasons Hotels*, 377 F.3d at 1167 n.4. Therefore, we hold that American Truss "has waived the arguments it has not properly presented for review." *Id.*

[2] *See also* 8 U.S.C.A. § 1182(n); 20 C.F.R. § 655.700 to 855; Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002), § 4(c)(18) (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board) (giving ARB authority to review ALJ decisions "as provided for or pursuant to . . . 8 U.S.C.A. § 1182(n)").

review is de novo. *See Talukdar v. U.S. Dep't of Veterans Affairs*, ARB No. 04-100, ALJ No. 2002-LCA-25, slip op. at 8 (Jan. 31, 2007) (ARB applies de novo review in INA cases).

ANALYSIS

American Truss has stipulated to the wage rate it must pay the employee, and does not specifically challenge the ALJ's ruling that it must pay the employee at least the stipulated rate for each hour worked. Petition at 2; Brief at 2; *see also* D. & O. at 4 (noting stipulation). The only argument American Truss raises on appeal is that "the ALJ erroneously certified [WHD]'s calculation of [the employee's] backpay irrespective of numerous and significant errors in both the Respondent's payroll records and [the WHD] worksheet." Brief at 5.

As American Truss sees it, the ALJ overlooked 18 "errors" relating to three categories of hours worked: (1) hours awarded through clerical errors – specifically, an extra "0.03" hours awarded during a week in 1999, *see* Brief at 4 (citing Petition at 5), and an extra "0.1" hours awarded during a week in 2000, *see* Brief at 4 (citing Petition at 4); (2) "double-count[ed]" hours worked during two further weeks in 2000, *see* Brief at 4 (citing Petition at 5); and (3) vacation and holiday hours, which American Truss argues should not count as "hours worked," *see* Brief at 3-4, Petition at 4.

With regard to the first error, it seems that American Truss failed to notice that the ALJ recognized, and eliminated from WHD's total, the 0.03 extra hours awarded in 1999. *See* D. & O. at 6. Thus, the ALJ already has corrected this particular error, and we need not further discuss it.

Regarding the other clerical error, as well as the two instances of double-counting, the Deputy Administrator points out that in calculating the hours for 2000, WHD "transferred the year to date totals of hours and wages paid . . . from the [American Truss payroll] records." Response Brief of the Deputy Administrator (Response) at 17 n.10 (quoting D. & O. at 6). Therefore, he argues, both the other clerical error, and the two instances of double-counting during individual weeks, are "inapposite because the Wage and Hour investigator applied the payroll's yearly totals for those years." Response at 17 n.10. We agree. American Truss specifically admits that the two double-counting errors were corrected, and does not argue that the other error was not corrected. Brief at 4 (citing Petition at 5). Because any errors in the weekly totals would have been eliminated in the yearly totals, and because WHD used the yearly totals, WHD did not use inaccurate figures and the ALJ did not err in adopting those figures.

Finally, with regard to the vacation and holiday hours, WHD argues that American Truss failed to raise this issue at the hearing. Response at 21 (citing *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-1, slip op. at 9 (ARB Apr. 30, 2004) (arguments not raised below are waived on appeal)). Perhaps anticipating this argument, American Truss argued in both its Petition and its Brief that it "requested at the

hearing and in its Closing Statement that a recalculation be undertaken to adequately address these errors, but the ALJ refused to do so." Brief at 3; Petition at 3.

In its Closing Statement, however, American Truss stated only that it "requests that the [WHD] Administrator be required to recalculate the backpay awards for all five claimants in light of the *discrepancies* in the Investigator's calculations, as discovered during the hearing." Respondent's Closing Statement at 10 (emphasis added).

American Truss also asserted in a footnote that "[D]uring the cross-examination of [the WHD investigator], it was discovered that there were *minor errors* in the *actual mathematical calculations* of backpay for [the employee], largely due to double-entries of entire weeks in the payroll documents." *Id.* at 2 n.1 (emphases added). But this latter statement not only fails to refer specifically to vacation and holiday hours, it also does not include a request that the ALJ correct the calculations for this employee's wages. Rather, the second (and only other) sentence of that footnote states: "In light of this discovery, Respondent asserts that it would be appropriate for the Administrator to undertake a recalculation of the original backpay determinations for *the other 4 Claimants*." *Id.* (emphasis added). [3]

A reference to "discrepancies" in the calculations could not have put the ALJ, or the Administrator, on notice that American Truss sought a ruling on whether vacation and holiday hours legitimately could count as hours worked.[4] The term "discrepancies" refers to divergences, disagreements, or inconsistencies. As used in the Closing Statement, the term discrepancies could be understood to refer to inconsistencies between the WHD calculations and the payroll records, to errors in the "actual mathematical calculations," or perhaps to inconsistencies in WHD's methodology from year to year. Thus, the Closing Statement fairly could be read to raise the issue of double-counting, particularly if read in conjunction with the footnote we have quoted.

The Closing Statement could not, however, be read to include an argument regarding WHD's inclusion of vacation and holiday hours. While American Truss argues that the inclusion of such hours was "based on . . . inadvertent oversight," it also admits that the WHD investigator "testified at the hearing that . . . [the employee] was given

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[3] Before the hearing, American Truss did not indicate that vacation and holiday hours were an issue. *See* Respondent's Amended Pre-Hearing Submission at 1-2. The Administrator did not ask any questions about such hours at the hearing, and did not include any argument on this issue in either of her written submissions to the ALJ. *See* Administrator's Pre-Hearing Submission at 3-4; Administrator's Closing Argument at 4-8.

[4] *See, e.g., Belt v. Emcare, Inc.*, 444 F.3d 403, 408 (5th Cir.), *cert. denied*, 127 S. Ct. 349 (2006) (to raise argument below, "litigant must press and not merely intimate the argument during the proceedings . . . . If an argument is not raised to such a degree that the district court has an opportunity to rule on it, we will not address it on appeal"); *Four Seasons Hotels*, 377 F.3d at 1168-71 (declining to address argument not raised below).

credit for hours not actually worked." Brief at 3. Moreover, the Deputy Administrator takes the position on appeal that the employee "should have been paid, at minimum, the required wage . . . for the hours he actually worked and for his vacation and holiday time." Response at 18.[5] Therefore, it is clear that WHD's decision to require American Truss to pay the employee for vacation and holiday hours was a conscious policy determination, not a mere "inadvertent oversight" or "discrepanc[y] in the . . . calculations." Because the inclusion of vacation and holiday hours was a policy decision and not a discrepancy, the argument that "discrepancies" justified recalculation did not fairly raise the argument that vacation and holiday hours should not have been included in the total hours worked.

Aside from a brief discussion, American Truss also did not raise this issue of vacation and holiday hours at the hearing. American Truss did comment, through its attorney, as a "clarification," that "I don't see any vacation weeks subtracted in these calculations." Hearing Transcript (T.) at 50. But the attorney previously had summarized the WHD investigator's testimony by asking "[s]o, essentially, if someone were to take two weeks off the employer would still have to guarantee the person monies for that time, is that right?" *Id.* After the WHD Investigator responded in the affirmative, the attorney replied "Okay" and added, "[T]hat's what I *was* concerned about."[6] *Id.* (emphasis added). The attorney's use of

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[5] The position of Administrator was vacant at the time the Response was due.

[6] The exchange is reproduced here in full:

MR. COLANGELO: . . . Now, Mr. Norris [the WHD Investigator], does that take into account any kinds of vacations or holidays, to your knowledge?

WITNESS: The companies under the H-1B regulations need to offer to the H-1B employees the same benefits as those offered to other employees. So, if an H-1B employee elects to receive vacation, which they technically would, I'm sure, and it's a two-week vacation and they're not at work during those two weeks, then they would not have to be paid an [sic] additional hours that they didn't work, they'd have to take the vacation.

BY. MR, COLANGELO:
Q: Is it reasonable to assume that an alien would not be working a full 52-week year, from your previous statements?

A: Most people don't work in every work week of the year, is my experience. But, you never [sic], some people do.

Q: Absolutely. If an employer has guaranteed the [sic] 40 hours a week times 52 weeks a year, that comes out to a certain figure, is that right?

A: That's correct.

Q: So, essentially, if someone were to take two weeks off the employer would still have to guarantee that person monies for that time, is that right?

the past tense suggests that – although he may have been "concerned" *prior to* the exchange – he no longer had a concern after the exchange. Had he remained concerned, the attorney would have said "That's what I *am* concerned about," and then would have sought to prove that the law did not require the inclusion of such hours. Instead, the attorney moved on to another topic and did not raise the issue again during the remainder of the hearing. For this reason, and because neither pre-hearing submission and neither closing statement referred to vacation and holiday hours, we conclude that the exchange at the hearing did not put the ALJ on notice that American Truss sought a ruling on vacation and holiday hours.

Because American Truss did not raise before the ALJ its argument regarding vacation and holiday hours, that argument has been waived (or rather forfeited, *see Talukdar*, slip op. at 14). Thus, we do not address it.[7]

CONCLUSION

Of the "errors" appealed by American Truss, one was never made (the 0.03 hours in 1999), three were inapposite (the errors relating to particular weeks in 2000), and the remaining 14 were waived (those relating to vacation and holiday hours). Therefore, we

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A: If they guarantee that to the Government, but if an employee takes time off, then it's – they don't have vacation time, let's just say that they take a week off, above and beyond what the vacation required, and this is maybe to take a trip to California because they want to go out there and they are granted that time off, the employer would not have to pay for that time.

Q: Okay. And that's – that's what I was concerned about. I don't – just for clarification, I don't see any vacation weeks subtracted in these calculations. Let me – let me rephrase the question, Your Honor. To your knowledge, did you see any breaks in [the company's] records showing vacation time?

A: I put down as hours the hours that were listed on the regular and overtime columns. There are also hours listed as – coded as H, and there's hours recorded as VA, which I assume are vacation.

Q: Moving on . . . .

T. 49-50.

[7] American Truss filed a Reply Brief (Reply) out of time, and without seeking an extension before time expired. Because the Reply relates only to the issue of holiday and vacation hours, we need not determine whether to admit it. We have not considered any arguments made in the Reply in reaching our decision. (The Reply does not indicate any place in the hearing or Closing Statement, beyond the instances we discuss above, where American Truss might have raised below its argument regarding vacation and holiday hours.)

AFFIRM the ALJ's decision, and **ORDER** that American Truss pay the employee $13,966.94 in back wages.

SO ORDERED.

A. LOUISE OLIVER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge