In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR,	**ARB CASE NO. 03-140**
	ALJ CASE NO. 2003-LCA-00015
PROSECUTING PARTY,	**DATE: September 30, 2004**

v.

KEN TECHNOLOGIES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:
For the Prosecuting Party Administrator, Wage and Hour Division:
Joan Brenner, Esq., Paul L. Frieden, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., *U.S. Department of Labor, Washington, D.C.*

For the Respondent Ken Technologies, Inc.:
Paul H. Mandal, Esq., Susheela Verma, Esq., *Edison, New Jersey*

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act, as amended (INA), 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2004), and regulations at 20 C.F.R. Part 655, Subparts H and I (2004). The Administrator, Wage and Hour Division, Employment Standards Administration brings this case on behalf of Jorige Chandrasekhar Prasad, a computer programmer analyst, who filed a complaint under the INA against his employer, Ken Technologies, Inc. (Ken), a computer development software company. Ken now petitions for review of a Decision and Order (D. & O.) an Administrative Law Judge (ALJ) issued on July 18, 2003. The ALJ upheld the Administrator's determination that Ken failed to pay Prasad wages in violation of the INA. We affirm the ALJ's decision.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has jurisdiction to review the ALJ's decision under 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 designee of the Secretary of Labor, 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 engages in de novo review of the ALJ's decision. *Yano Enterprises, 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).

REGULATORY FRAMEWORK

The INA permits employers to employ nonimmigrant alien workers in specialty occupations in the United States. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b). These workers commonly are referred to as H-1B nonimmigrants. Specialty occupations are occupations that require "theoretical and practical application of a body of highly specialized knowledge, and . . . attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C.A. § 1184(i)(1). To employ H-1B nonimmigrants, the employer must obtain certification from the United States Department of Labor after filing a Labor Condition Application (LCA). 8 U.S.C.A. § 1182(n). The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrants. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 655.732. After it secures the LCA, the employer petitions for and nonimmigrants receive H-1B visas from the State Department upon Immigration and Naturalization Service (INS) approval. 20 C.F.R. § 655.705(b).[1]

An employer violates the INA if, for employment-related reasons, it fails to pay an H-1B nonimmigrant who is in "nonproductive status." Employment-related nonproductive status results from factors such as lack of available work for the nonimmigrant or a nonimmigrant's lack of a permit or license. 8 U.S.C.A. § 1182(n)(2)(C)(vii); 20 C.F.R. § 655.731(c)(7)(i). But an employer need not compensate

[1] The INS is now the "U.S. Citizenship and Immigration Services" or "USCIS." *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002).

a nonimmigrant if it has effected a "*bona fide* termination" of the employment relationship. 20 C.F.R. § 655.731(c)(7)(ii). The employer must notify the INS that it has terminated the employment relationship so that the INS may revoke approval of the H-1B visa. 8 C.F.R. § 214.2(h)(11).

ISSUE

Did Ken violate the INA when it did not pay Prasad?

BACKGROUND

We summarize the ALJ's detailed factual statement. D. & O. at 3-8. Prasad traveled from India to the United States to work for Ken subject to an LCA and an H-1B visa. He arrived in the United States on February 18, 2001, and departed the United States to return to India on July 17, 2001. During this period, Ken did not assign Prasad any projects, Prasad attempted to find work on his own, and he stayed in a guest house which Ken maintained. Ken did not pay Prasad any wages because it discovered that he was not qualified to perform required services.

In early July 2001 Prasad complained to the Wage and Hour Division about not being paid. Administrator's Exhibit (AX) 5. After investigating, the Administrator determined that Ken had violated the INA because it had failed to pay Prasad while in nonproductive status for employment-related reasons. The Administrator ruled that Ken was liable for $15,233.81 in back wages for the period March 18, 2001 (thirty days after Prasad entered the United States as provided under 20 C.F.R. § 655.731(c)(6)(ii)) to July 16, 2001, the day before Prasad returned to India. Hearing Transcript (T.) 21-22, 26-27.

The ALJ agreed with the Administrator's finding that Ken had violated the INA and was liable for back wages. Ken contests the back wage liability, arguing that it terminated Prasad's employment on February 26, 2001. On the other hand, Prasad claims in a statement to the Wage and Hour investigator and in a July 2001 e-mail to Ken that he did not become aware of the termination until much later. AX 5; Respondent's Exhibit (RX) 4.

The ALJ found that Ken had not effected a bona fide termination of the employment relationship because Prasad continued to live in Ken's guest house until shortly before he returned to India and, more importantly, because Ken did not notify the INS of Prasad's termination. D. & O. at 9, 10-11. The ALJ also found that Prasad became aware of his termination only belatedly. *Id.* at 6.

DISCUSSION

An employer "that has had an LCA certified and an H-1B petition approved for [an] H-1B nonimmigrant shall pay the nonimmigrant the required wage beginning 30 days after the date the nonimmigrant first is admitted into the U.S. pursuant to the petition . . . ." 20 C.F.R. § 655.731(c)(6)(ii). *See* 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I)

(employer liable for wages for H-1B nonimmigrant in nonproductive status due to a decision by the employer such as lack of assigned work or lack of a permit or license). Ken does not dispute that it arranged for Prasad to enter the United States after it obtained an LCA and H-1B petition for Prasad. *See* AX 1 (LCA), AX 2 (INS petition). Furthermore, Ken does not deny that it did not pay Prasad wages. Respondent's Brief at 3-6. The Administrator thus established that Ken failed to meet a condition of the LCA and that it violated the INA. Therefore, in order to avoid liability, Ken must prove by a preponderance of the evidence the presence of "[c]ircumstances where wages need not be paid." The circumstance at issue here is whether Ken terminated Prasad's employment. 20 C.F.R. § 655.731(c)(7)(ii). We find that Ken has not met this burden.

Granted, the record contains a "Termination Letter" dated February 26, 2001, from Arun Jain, Ken's "principal" (Resp. Br. at 12), to Prasad. We also have Jain's affidavit wherein Jain states that Prasad's employment was terminated "immediately" upon arrival in the United States. RX 10 (par. 5). Jain states further, "Mr. Prasad was clearly advised that he was terminated and was asked to leave the United States. However, he [Prasad] continued to remain in Ken's guest house as an intruder. He refused to leave despite our numerous demands that he do so." *Id.* (par. 6). Jain is not more specific about the circumstances of the termination, except to say that "in the month of May we gave him [Prasad] an ultimatum . . . ." *Id.* Furthermore, Ken's records, titled "List of H1B's and their status uptodate [sic]" and "Details of Employees who joined Ken Technologies," bear the following notations about Prasad: "Terminated on 02/26/2001" and "Service Terminated. Termination Letter of 2/26/01 is [sic] there is also an undertaking from him that No Dues are pending." *See* AX 9.

Even so, Ken has not demonstrated by a preponderance of the evidence that it terminated Prasad's employment because the record also contains Prasad's July 3, 2001 statement to the Wage and Hour investigator in which he claims that he did not know about the termination: "Currently they [Ken] are holding my Engineering Certificate, which I had given to them when I came here . . . . When I asked my salary to them I received a mail that I have been terminated from the company long back but I did not received any word or mail about my termination." AX 5. Further, by e-mail sent to Jain on July 5, 2001, Prasad states: "How can you terminate without intimation. Why you didn't tell me. Without my degree certificate I don't leave this guesthouse." RX 4. Finally, Ken conceded that it never notified INS that it had terminated Prasad's employment so that INS could revoke approval of Prasad's H-1B visa. D. & O. at 7; T. 18-19; AX 9 (notification of Prasad termination to INS marked "NA" [not applicable]).

The ALJ attached too much significance to this failure to notify the INS. She held that a termination is bona fide only if the employer notifies INS about the termination. D. & O. at 9. It is true that implementing regulations require that the H-1B "petitioner" (e.g., Ken) notify the INS "immediately" of any changes in the terms and conditions of employment of a "beneficiary" (e.g., Prasad) that may affect eligibility as an H-1B nonimmigrant. 8 C.F.R. § 214.2(h)(11). And if the petitioner no longer employs the beneficiary, the petitioner must submit a letter explaining the changes to the INS director who approved the petition. *Id. See also* 20 C.F.R. § 655.731(c)(7)(ii) ("INS regulations

require the employer to notify the INS that the employment relationship has been terminated so that the petition is canceled."). Nevertheless, we hold that whether a termination is bona fide does not turn solely on whether the employer notified INS. The employer should be permitted to present other evidence concerning whether it terminated the H-1B employee. Filing such notification with INS constitutes additional, not conclusive, evidence of termination. Therefore, we find that Ken's failure to notify the INS that it had terminated Prasad's employment is only some evidence that it did not terminate his employment.

Ken offers three additional arguments. First, it argues that *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), applies. We disagree. *Hoffman* denied back wages to an undocumented alien who was never authorized to work in the United States. Here, by contrast, the LCA and H-1B visa authorized Prasad's admission to the United States to work for Ken as a nonimmigrant. Second, Ken argues that the INA regulatory scheme violates the Fifth Amendment due process clause because it imposes a burden on H-1B employers (i.e., paying for nonproductive time) not imposed on other employers. The ALJ lacks authority to decide this constitutional challenge to the agency's governing statute and regulations. 20 C.F.R. §§ 655.840(d), 655.845. So do we. *See Jones v. EG&G Def. Materials, Inc.*, ARB No. 97-129, ALJ No. 95-CAA-3, slip op. at 8-9 (ARB Sept. 29, 1998) ("[A]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies," citing U.S. Supreme Court precedent). Third, Ken argues that the ALJ denied it procedural due process when she accepted the Wage and Hour investigator's hearsay testimony and disallowed Jain's testimony by telephone from India. But hearsay is admissible in administrative proceedings concerning the INA. *See* 20 C.F.R. § 655.825(b). Furthermore, the regulations invest ALJs with considerable latitude in ordering proceedings. 29 C.F.R. § 18.29. *See also* 5 U.S.C.A. § 556 (West 1996). Thus, the ALJ did not abuse her discretion when she permitted the hearsay testimony and did not permit the telephonic testimony.

CONCLUSION

Ken not did not prove by a preponderance of the evidence that it effected a bona fide termination. Therefore, Ken violated the INA when it failed to pay Prasad wages while he was in nonproductive status due to lack of assigned work and is liable for unpaid wages. Thus, we **AFFIRM** the ALJ's **ORDER** that Ken pay the Administrator $15,233.81 for back wages owed to Prasad.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge