In the Matter of:

YANO ENTERPRISES, INC., d/b/a SHOGUN JAPANESE STEAKHOUSE,

PETITIONER,

v.

ADMINISTRATOR, WAGE AND HOUR DIVISION, Employment Standards Administration, U.S. Department of Labor,

RESPONDENT.

ARB NO. 01-050

ALJ NO. 2001-LCA-0001

DATE: September 26, 2001

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

Appearances:

For the Petitioner:
Robert H. Grizzard, II, Esq., *Lakeland, Florida*

For the Respondent:
Carol B. Feinberg, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., *U.S. Department of Labor, Washington, D.C.*

FINAL DECISION AND ORDER

I. INTRODUCTION

This matter arises under the Immigration and Nationality Act (INA) H-1B visa program, 8 U.S.C.A. §§1101(a)(15)(H)(i)(b) and 1182(n) (West 1999). The Administrator of the Wage and Hour Division ("Administrator") brought this enforcement action pursuant to 20 C.F.R. §655.855 (2000) to collect underpaid back wages from an H-1B employer owed to Jose Pasqual Araque, an H-1B non-immigrant Venezuelan citizen. The Administrative Law Judge ("ALJ")

[1/] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

recommended that Respondent Yano Enterprises be ordered to pay Araque $102,797.02 in back wages. By this Order, and for the reasons set forth herein, we adopt the ALJ's recommendation.

In *Administrator v. Native Technologies, Inc.*, ARB No. 98-034, ALJ No. 96-LCA-2 (May 28, 1999), we described the workings of the H-1B program in some detail. Briefly, the INA of 1952, as amended in 1990 and 1991,[2/] among other things defines a class of non-immigrant aliens, known as "H-1B" workers, who may enter the United States on a temporary basis to work in "specialty occupations," or as fashion models of distinguished merit and ability. 8 U.S.C.A. §1101(a)(15); 20 C.F.R. §655.700(c)(1) (2000).

The H-1B program is limited, with restrictions on the number of visas issued in any fiscal year and a maximum six-year period of admission for the authorized H-1B visa holder. 8 U.S.C.A. §1184(g). An employer seeking to hire an alien in a specialty occupation on an H-1B visa must first obtain certification from the U.S. Department of Labor by filing a Labor Condition Application for H-1B Nonimmigrants ("LCA"); only after the employer receives the Department's certification will the Immigration and Naturalization Service ("INS") approve the visa petition. 8 U.S.C.A. §1101(a)(15)(H)(i)(b)*; see* 20 C.F.R. Part 655, Subparts H and I.

The relevant facts in this case are undisputed. Yoshikazu Yano and Araque were college roommates in 1985. By 1993, Yano had become the sole owner of Yano Enterprises, a corporation that does business in Lakeland, Florida under the name Shogun Japanese Steak House. In or around 1993, Araque called Yano from Venezuela inquiring about job opportunities in the United States. Yano offered Araque a job as the Personnel Manager of Yano Enterprises. Araque accepted.

On November 15, 1993, Yano filed a LCA with the Department and requested that Araque be certified to work as the Personnel Manager of Yano Enterprises at an annual salary of $30,000 for the period of January 1, 1994, to December 31, 1996. Yano's request was approved and Araque began working for Yano Enterprises shortly thereafter. The Department approved a subsequent LCA for Araque which permitted him to continue working for Yano Enterprises until January 1, 2000. During Araque's employment with Yano Enterprises, Araque lived in Yano's home.

Ultimately, Yano fired Araque. Araque then filed a claim with the Department for unpaid wages. After investigating this matter, the Administrator determined that Yano Enterprises underpaid Araque. The Administrator assessed Yano Enterprises a civil money penalty of $1,750.00 and net back wages of $92,297 (total back wages of $102,797 less an offsetting credit of $10,500.00 reflecting the value of housing that Yano provided to Araque). Yano considered

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[2/] Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, 105 Stat. 1733 (1991).

the back pay award excessive and requested an administrative review of the Administrator's determination.[3/] The matter was referred to an ALJ for a hearing.

According to Yano, he verbally agreed to pay Araque $5.00 an hour. Although both LCAs specified a salary of $30,000, Yano attempted to distance himself from the forms by testifying that the salary information was not on the second form when he signed it. When asked whether the salary information was on the first form, Yano said he could not remember. The ALJ found that Yano was being either less than truthful or willfully ignorant. In any event, the ALJ reasoned that Yano signed both LCAs and, as a result, was required by the applicable regulations to pay Araque the greater of his actual wage or the prevailing wage. Inasmuch as the Department approved a prevailing wage of $30,000 a year, the ALJ reasoned that Yano must pay that amount.

Yano also asserted that the $10,500.00 housing credit was too small and argued that he was entitled to a credit of $34,700.00. Araque, on the other hand, argued Yano should not receive any credit for housing. After reviewing the applicable regulations, the ALJ noted that under 29 C.F.R. §655.731(c)(7)(iii) a deduction is only allowable if it is made in accordance with a voluntary, written authorization from the employee. Yano Enterprises produced no such written authorization. Therefore, the ALJ disallowed the housing credit in its entirety and directed Yano Enterprises to pay back wages in the amount of $102,797.02. This appeal followed.

II. JURISDICTION

We have jurisdiction pursuant to 20 C.F.R. §655.845.

III. STANDARD OF REVIEW

Under the Administrative Procedure Act, we have plenary power to review an ALJ's factual and legal conclusions *de novo*. *See* 5 U.S.C.A. §557 (b) (West 1996); *Masek v. Cadle Co*., ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000).

IV. DISCUSSION

Pursuant to 20 C.F.R. §655.731 (c), "[t]he required wage must be paid to the employee, cash in hand, free and clear, when due, *except that* deductions made in accordance with paragraph (c)(7) of this section may reduce the cash wage below the level of the required wage." (Emphasis in original.) Paragraph (c)(7) provides as follows:

> (7) "*Authorized deduction,*" for the purposes of the H-1B required wage obligation, means a deduction from wages in complete compliance with one of the following sets of criteria -

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[3/] Yano Enterprises did not object to the civil money penalty of $1,750.00.

* * *

> (iii) Deduction which meets the following requirements:
>
> (A) Is made in accordance with a voluntary, written authorization by the employee (Note: an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization even if such condition were stated in writing);
>
> (B) Is for a matter principally for the benefit for the employee . . .;
>
> (C) Is not a recoupment of the employer's business expenses . . .;
>
> (D) Is an amount that does not exceed the fair market value or the actual cost . . .; and
>
> (E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act, 15 U.S.C. 1673, and the regulations of the Secretary . . . .

According to Yano:

> The ALJ herein [h]as construed that all of the requirements of this subsection must be met or a deduction would fail. He has held as a matter of law that any and all deductions must be in writing signed by the employee. By doing so he has effectively inserted the word "and" after each of the sub-clauses. But the word is not there. There is nothing to indicate that a writing would be required where the test of sub-clause (B) is not met. General principles of statutory or regulatory interpretation do not support the ALJ's interpretation of the Rule.

The basic tenets of statutory construction are applicable to the interpretation of regulations. *See Boeing Co. v. United States*, 258 F.3d 958, 966 (9th Cir. 2001)*; Idahoan Fresh v. Advantage Produce, Inc*., 157 F.3d 197, 201 (3d Cir. 1998). Generally, a statute should be read as punctuated unless there is some reason to do otherwise. 2A N. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION §47.15 (5th ed. 1992). Yano Enterprises has not argued, nor do we discern, any reason for interpreting this regulation differently than its punctuation suggests.

The issue before us is whether an employer must comply with subsection (c)(7)(iii)(A) in order to qualify for a reduction in wages owed the employee. This provision is one of five subordinate clauses. Each of the five clauses occupies the same structural position of subordination relative to the main clause and each is separated by a semicolon, with the last two clauses being separated by the conjunctive "and."

According to Professor Richard Wydick:

> Sometimes the best way to present a cluster of conditions, or exceptions, or other closely related ideas is in one long sentence, split up like a laundry list. This device is called tabulation . . . . When you tabulate, follow these conventions:
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> * * *
>
> 3. After each item in the list, except the last, put a semicolon followed by *or* (if the list is disjunctive) or *and* (if the list is conjunctive). If both the list and the items are short, and if the reader will not become confused, you can omit the *and* or *or* after all except the next-to-last item.

RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS at 47-48 (4th ed. 1998). If the clauses under subsection (c)(7)(iii), were intended to be read as alternative bases for a deduction as Yano Enterprises implies, then the last two clauses would be separated by the disjunctive "or." Inasmuch as the last two clauses are separated by the conjunction "and," we conclude that all of the clauses were intended to be read in conjunction with each other and that a deduction would not be appropriate unless the employer met the conditions set forth under all five clauses. *See, e.g., United States v. Bazel*, 80 F.3d 1140, 1144 (6th Cir.), *cert. denied*, 519 U.S. 882 (1996) (in portion of federal Sentencing Guidelines having multiple clauses joined by semi-colons and ending with the conjunctive "and," the semicolons and the word "and" have equivalent meaning). Therefore, the ALJ did not err in concluding that Yano Enterprises' failure to satisfy subsection (c)(7)(iii)(A) rendered it ineligible for a deduction.

Yano Enterprises also argues that the ALJ violated its Fifth Amendment due process rights by increasing the penalty. In support of its argument, Yano Enterprises cites *North Carolina v. Pearce*, 395 U.S. 711 (1969). *Pearce* involved a criminal defendant who succeeded in having his conviction set aside by the Supreme Court of North Carolina. Following a new trial, the trial judge convicted Pearce and sentenced him to a term longer than the one originally imposed. Ultimately, Pearce's case reached the U.S. Supreme Court. The Court held that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. However, the Court held that it would be a flagrant violation of the Due Process Clause for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for having succeeded in getting his original conviction set aside. *Pearce* is clearly inapposite. The matter before us is not a criminal case, and there is no indication that the ALJ increased the fine out of vindictiveness.

Here, the ALJ determined that, as a matter of law, Yano Enterprises could not receive a credit for housing without first producing a written document showing that Araque voluntarily agreed to have his housing expenses deducted from his wages. Yano Enterprises produced no such document and, therefore, was not entitled to a deduction. In the absence of an entitlement

to a deduction, the ALJ had no alternative but to find that Yano Enterprises must pay Araque the full amount of the wages due him.[4/] Accordingly, the decision of the ALJ is **AFFIRMED**.

SO ORDERED.

PAUL GREENBERG
Chair

RICHARD A. BEVERLY
Alternate Member

[4/] In an unusual footnote in a response brief (n.10), the Acting Administrator urges the Board to remand this case to the ALJ to consider whether Yano should be granted a partial offset for providing housing to Araque. The Acting Administrator notes that 20 C.F.R. §655.731(c)(7) did not become effective until January 19, 1995, approximately 10 or 11 months after Araque began living in Yano's home. However, the Acting Administrator never appealed the ALJ's Decision to this Board – Yano Enterprises did. And Yano Enterprises has never made this argument to the Board. In this instance, we decline to consider an issue that has not been properly appealed by either party.