In the Matter of:

GUY SANTIGLIA,

PETITIONER,

v.

SUN MICROSYSTEMS, INC.,

RESPONDENT.

ARB CASE NO. 03-076

ALJ CASE NO. 2003-LCA-2

DATE: July 29, 2005

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Petitioner*:**
Guy Santiglia, *pro se, Belgrade, Montana*

***For the Respondent*:**
Roxana C. Bacon, Esq.; Diane M. Dear, Esq., *Littler Mendelson Bacon & Dear PLLC, Phoenix, Arizona*

FINAL DECISION AND ORDER

Guy Santiglia filed complaints with the United States Department of Labor (DOL) contending that Sun Microsystems, Incorporated, violated various provisions of the Immigration and Nationality Act, as amended (INA or Act), 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2004), and its implementing regulations at 20 C.F.R. Part 655, Subparts H and I (2004). A DOL Administrative Law Judge (ALJ) heard the case and decided that Sun violated only the posting and public access requirements of the Act and that neither of these violations was substantial or willful. Thus, the ALJ did not assess civil money penalties but only ordered Sun to change its posting practices. *Santiglia v. Sun Microsystems, Inc.*, ALJ No. 2003-LCA-2 (ALJ Feb. 19, 2003). Santiglia appealed. We affirm.

BACKGROUND

The INA defines various classes of aliens who may enter the United States for prescribed periods of time and for prescribed purposes. 8 U.S.C.A. § 1101(a)(15). One class of aliens, known as "H-1B" workers, is allowed entry to the United States on a temporary basis to work in "specialty occupations." *Id.* at § 1101(a)(15)(H)(i)(B); 20 C.F.R. § 655.700.

To hire an H-1B worker, an employer must file a Labor Condition Application (LCA) with the Employment and Training Administration of the DOL. The LCA includes information about the job title, the employer's name, the area of intended employment, the dates of intended employment, the prevailing wage, actual wage, or a wage range for the position, the source of the employer's wage information, and the number of positions requested. The employer is also required to make available for public examination at the employer's principal place of business, within one working day after the LCA is filed, a copy of the LCA, along with any necessary supporting documentation. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.705(c).

The employer must make certain representations and attestations in the LCA regarding his responsibilities, including a representation that the alien will be paid the greater of either the actual wage level paid to all other individuals with similar experience and qualifications for the employment in question or the prevailing wage in the area for the type of work involved. 8 U.S.C.A. § 1182(n)(1)(A)(i)(I)-(II); 20 C.F.R. § 655.731. An employer must also represent and attest that it has provided notice to its employees in the occupational classification and location for which the H-1B workers are sought that it has filed the LCA with DOL. 8 U.S.C.A. § 1182(n)(1)(C)(ii); 20 C.F.R. § 655.734. After DOL certifies the LCA, the employer petitions for, and the aliens receive, H-1B visas from the State Department upon INS approval. 20 C.F.R. § 655.705(b).[1]

Sun is a multi-national employer with over 37,000 employees worldwide. Hearing Transcript (HT) at 168. Beginning in July 2001, Sun employed Santiglia as an IR Technologist II at Sun's Santa Clara Campus until it laid him off on November 5, 2001. HT at 55; Complainant's Exhibit (CX) 12.

After his lay off, Santiglia wanted to determine whether Sun was laying off American workers and replacing them with H-1B workers who, he believed, were paid less than American workers. In this effort, Santiglia repeatedly examined Sun's public LCA files. HT at 77-78, 152-153. Eventually, Santiglia filed complaints with the DOL's Wage & Hour Administrator alleging that Sun did not give him access to its LCA public records, that Sun used expired forms, that the LCAs were not properly posted, that he was

[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).

denied access to documents pertaining to the exact pay the H-1B workers received, that Sun had replaced American citizen workers with H-1B workers, that Sun was limiting the amount of time he had access to the LCA files, that Sun hired H-1B employees for a job that did not meet the "specialty occupations" requirement, and that Sun was not stating the prevailing wage properly. He asked the Administrator to find that Sun was a willful violator. ALJ's February 19, 2003 Decision and Order (D. & O.) at 1-2. After investigating Santiglia's allegations, the Administrator determined that Sun's only INA violations were in not posting LCAs at its Sunnyvale, California and Austin, Texas locations. She concluded that these violations were not willful. Therefore, she did not assess civil penalties. CX 8. Santiglia appealed the Administrator's determination and the case was assigned to the ALJ for a hearing. *See* 20 C.F.R. § 655.820(a).

The ALJ concluded that Sun failed to comply with the LCA posting requirements because it did not post at least two copies of LCAs at the location where H-1B workers would be working. D. & O. at 10-11. In addition, the ALJ concluded that Sun violated the INA's public access requirement because it refused to allow Santiglia access to its public LCA files between March 31, 2002, and July 29, 2002. D. & O. at 12. But the ALJ found that these violations were neither substantial nor willful. Therefore, she did not assess civil money penalties, but only ordered Sun to change its LCA posting practices. Santiglia filed a timely petition for review with the Administrative Review Board (ARB or the Board).[2]

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review an ALJ's decision pertaining to the INA. 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, inter alia, under 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 engages in de novo review of the ALJ's decision. *Yano Enters. v. Administrator*, ARB No. 01-050, ALJ No. 2001-LCA-0001, slip op. at 3 (ARB Sept. 26, 2001); *Administrator*

[2] *See* 20 C.F.R. § 655.845. The Board also received requests for permission to file a brief as an interested party from Robert Sanchez, Robert A. Smith, Joseph P. Valley and Norman Matloff. The Board construed these requests as petitions for review and dismissed them as untimely filed pursuant to 20 C.F.R. § 655.845(a). *See Valley v. Sun Microsystems, Inc.*, ARB No. 03-128, ALJ No. 03-LCA-2 (ARB July 31, 2003); *Matloff v. Sun Microsystems, Inc.*, ARB No. 03-129, ALJ No. 03-LCA-2 (ARB July 31, 2003); *Sanchez v. Sun Microsystems, Inc.*, ARB No. 03-130, ALJ No. 03-LCA-2 (ARB July 31, 2003); *Smith v. Sun Microsystems, Inc.*, ARB No. 03-131, ALJ No. 03-LCA-2 (ARB July 31, 2003).

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).

Santiglia appears before the Board pro se. We construe complaints and papers that pro se complainants file "liberally in deference to their lack of training in the law" and with a degree of adjudicative latitude. *Young v. Schlumberger Oil Field Serv.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-10 (ARB Feb. 28, 2003), *citing Hughes v. Rowe*, 449 U.S. 5 (1980).

DISCUSSION

Santiglia's Motion to Remand

Prior to filing a brief in support of his petition for review, Santiglia filed a "Motion to Remand case to Office of Administrative Law Judges." Santiglia claims that "the original hearing in this matter had extraordinary problems," and that, therefore, the matter must be remanded for a "de novo review" by an ALJ. On September 10, 2003, the Board ordered Santiglia's motion to be carried with the case. We now address Santiglia's motion.

We construe this motion as one requesting a new hearing or trial. The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges do not contain a rule that governs motions for a new hearing. Nevertheless, the rules do state that "[t]he Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." 29 C.F.R. § 18.1(a). Federal Rule of Civil Procedure 59(a)(2) reads: "A new trial my be granted to all or any of the parties and on all or part of the issues . . . in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States." Three grounds exist for granting new trials in court-tried actions under Rule 59(a)(2): (1) manifest error of law; (2) manifest error of fact; and (3) newly discovered evidence. *Brown v. Wright*, 588 F.2d 708, 709 (9th Cir. 1978) citing 6A Moore's Federal Practice P 59.07 at 59-94. We must deny Santiglia's motion because it does not contain grounds for a new trial.

Santiglia argues that a new trial is warranted because he now has evidence relating to the Administrator's investigation of his complaints that he obtained after the hearing pursuant to a Freedom of Information Act (FOIA) request. He claims that this evidence shows that the Administrator committed errors in the investigation and in the subsequent determination of his complaints. Santiglia also claims that he should be permitted to introduce new evidence regarding the location of Sun's corporate

headquarters. Santiglia has not made any showing, however, that this evidence is "newly discovered" and was not available prior to or during the hearing. Therefore, the existence of this evidence does not warrant a new hearing.

Santiglia also contends that he was unfairly prejudiced when the ALJ granted the Administrator's motion to withdraw. He argues that he had expected DOL's investigators to testify at the hearing, however when the ALJ permitted the Administrator to withdraw, the investigators did not testify. But the ALJ properly granted the motion to withdraw since the Administrator was not a party when Santiglia requested a hearing and did not choose to exercise her discretion to intervene or appear as amicus curiae. *See* 20 C.F.R. § 655.820(b)(1); ALJ's Order Re: Parties' Motions (Dec. 4, 2002) at 1-2.

Santiglia argues that the ALJ erred on the second day of the two-day hearing in not allowing him to testify about potential exhibits that he had submitted and in denying his request to cross-examine Heidi Wilson, a Sun employee. The ALJ denied Santiglia's request to cross-examine Wilson because Santiglia's lawyer, who withdrew before the second day of hearing, had already cross-examined Wilson the day before and she had been excused as a witness. The lawyer had also presented the exhibits and had argued for their admission. On the second day of the hearing, the ALJ allowed Santiglia to respond to Sun's objections to the exhibits, but would not allow him to present additional testimony about the exhibits. HT at 225-227. An ALJ has considerable latitude in conducting a hearing. 29 C.F.R. § 18.29. *See also* 5 U.S.C.A. § 556 (West 1996). The ALJ's actions here were reasonable and not an abuse of discretion. Therefore, they do not constitute grounds for a new trial.

Finally, Santiglia's charge that DOL's regional solicitor "acted to obstruct justice in this matter" has no merit and is not grounds for a new trial.

We turn to Santiglia's arguments concerning the ALJ's decision.

Burden of Proof

The ALJ held that Santiglia, as the prosecuting party, has the burden of proving each of his allegations about Sun's unlawful conduct. D. & O. at 9; HT at 74. Santiglia contends that the ALJ erred in so holding because one of the DOL regulations states, "The employer shall develop sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its LCA and the accuracy of information provided, in the event that such statement of information is challenged." 20 C.F.R. § 655.705(c)(5). Santiglia Brief at 39-40.

But Santiglia confuses the employer's responsibility to develop and maintain documentation sufficient to support statements in a LCA that "shall be made available to

the DOL upon request,"[3] with the prosecuting party's burden of proof at the hearing. The party who requests a hearing before an ALJ is the prosecuting party. 20 C.F.R. § 655.820(b)(1). As the prosecuting party who requested the hearing, the burden of proof falls on Santiglia, not Sun. *See* 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence §63 (2d ed. 1994) ("[The] broadest and most accepted idea [is] . . . that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims."). Thus, we reject Santiglia's argument that the ALJ erred in assigning the burden of proof to him.

"Blanket" LCAs

Santiglia contends that the ALJ should have addressed his allegation, contained in his prehearing statement, that Sun violated the Act because it filed "blanket" LCAs instead of accurately specifying the actual number of H-1B workers it sought to employ. Santiglia Brief at 4-8. Santiglia points to a DOL regulation which requires the Administrator to investigate and determine whether an employer failed to accurately specify on an LCA the number of workers sought in a particular occupational classification. 20 C.F.R. § 655.805(a)(6).

Sun filed a motion in limine requesting that the ALJ exclude this allegation. The ALJ granted the motion because Santiglia did not allege this violation in the complaints he filed with the Wage and Hour Division. As a result, the Administrator did not investigate this allegation and, thus, did not determine its merits. A complainant, like Santiglia, has a right to request that an ALJ decide whether an employer has violated the Act only after the Administrator has investigated the complainant's allegations and then determined that the employer did not violate the Act. 20 C.F.R. § 655.820(b)(1). We therefore conclude that the ALJ properly excluded Santiglia's allegation concerning "blanket" LCAs.[4] We also note that though an employer must file a separate LCA for

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[3] *See* 20 C.F.R. §§ 655.705(c) and 655.734(b)-(c). *See also* 20 C.F.R. § 655.800(b)-(c) (In an investigation, the Administrator shall "gather such information as deemed necessary by the Administrator" and an employer "shall make available to the Administrator such records … as the Administrator deems appropriate").

[4] Santiglia also contends that Sun's use of "blanket" LCAs renders useless the protections afforded to U.S. workers displaced in the period beginning 90 days before and ending 90 days after "the filing of LCAs." Santiglia's Rebuttal Brief at 11-12. *See* 20 C.F.R. § 655.810(b)(3). But this rule affords protections to U.S. workers displaced in the period beginning 90 days before and ending 90 days after "the filing *of an H-1B petition*" (emphasis added), which is distinct from the filing of an LCA. An H-1B visa petition is filed for a specific H-1B worker only after an LCA has been filed and certified by the DOL. 20 C.F.R. § 655.705(b). Thus, Sun's use of "blanket" LCAs has no bearing on the protections afforded to displaced U.S. workers under Section 655.810(b)(3).

each *occupation* for which it seeks H-1B workers, the LCA may cover more than one intended position within that occupation. 20 C.F.R. § 655.730(c)(2). Moreover, all of the LCAs contained in the record do specify the number of workers that Sun sought. *See* CX 9-10, 15-19, 23, 41.

The ALJ's Conduct

Santiglia contends that the ALJ erred in excluding evidence he submitted to show, in part, that the stated prevailing wages in Sun's LCAs were incorrect.[5] Santiglia Brief at 22. He also claims that she erred in not allowing him to give testimony about his submitted exhibits on the second day of the hearing and in denying his request to have an expert witness testify. Santiglia Brief at 38, 41. As we pointed out in our discussion about Santiglia's motion for remand, the record demonstrates that the ALJ allowed Santiglia to respond to Sun's objections about potential exhibits that his lawyer had submitted the day before, but ruled that he would not be allowed an opportunity to present additional evidence or testimony about those exhibits after he had already testified about them the day before. HT at 225-227. The ALJ also excluded evidence which Santiglia could not authenticate at the hearing.[6] Furthermore, the ALJ denied Santiglia's request for an expert witness to testify because the witness had no relevant firsthand, personal knowledge of the facts at issue. HT at 12, 17-18. In as much as an ALJ is vested with considerable latitude in ordering proceedings, we find that the ALJ's evidentiary rulings about which Santiglia complains were appropriate and legally sound. 29 C.F.R. § 18.29. *See also* 5 U.S.C.A. § 556. Therefore, the ALJ did not abuse her discretion, and we reject Santiglia's contention that the ALJ erred.

Whether IR Technology is a "Specialty Occupation."

Reiterating his argument before the ALJ, Santiglia contends that the IR System Technologist I and II positions for which Sun filed LCAs are not "specialty occupations" and that, therefore, the LCAs should not have been approved. Santiglia Brief at 27-29. "'Specialty occupation' means an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree (or its equivalent) in the specific specialty as a minimum for entry in to the occupation in the United States." 8 U.S.C.A. § 1184(i)(1); 20 C.F.R. § 655.715. The ALJ properly concluded that she lacked jurisdiction to rule on this argument since only the INS has the authority to determine what constitutes a "specialty occupation." D. & O.

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5 Santiglia also relies on evidence that is not a part of the record to support his contention on appeal that the stated prevailing wages in Sun's LCAs were incorrect, but he has not shown that the material or information he wishes to introduce in support of his contention was not "readily available prior to the closing of the record" in this case. *See* 29 C.F.R. § 18.54(c).

6 *See e.g.*, HT at 107-108, 119, 242, 244, 251, 254, 259-262, 266, 268, 272, 275-279.

at 15. *See* 20 C.F.R. § 655.715 ("Determinations of specialty occupations and of nonimmigrant qualifications are made by INS."); 20 C.F.R. § 655.705(b) ("[T]he INS determines … whether the occupation named in the labor condition application is a specialty occupation.").

Sun had four levels of system technologists: ST1, the most junior, through ST4, the senior level. It paid the technologists different salaries according to their levels. HT 200-201. Santiglia claims that Sun violated the Act because, by not specifying on the LCA the level of system technologist it sought to hire and including a salary range for the position it was offering, it misrepresented the wage rate to be paid. Santiglia Brief at 24-25. But since the regulations permit an employer to indicate on an LCA that multiple positions are available within a particular occupation and that a range of wages are available, we reject this argument.[7]

Posting Violations

In his complaint, Santiglia alleged that Sun had not posted notices that it intended to hire H-1B employees. An employer seeking H-1B workers must, on or within 30 days before the date the LCA is filed, post notices that it has filed an LCA with DOL. The notice must indicate that the employer is seeking H-1B workers, the number sought, the occupational classification, the wages offered, the period of employment, and the location of employment. *See* 8 U.S.C.A. §§ 1182(n)(1)(C)(ii), (D); 20 C.F.R. § 655.734(a)(1)(ii). The Administrator found that Sun had "failed to post the required LCAs" at two of its worksites. (The regulation requires the employer to post a "notice," not the LCA itself.). CX 8. After requesting a hearing that an ALJ review the Administrator's findings, Santiglia made additional specific allegations concerning posting violations in his prehearing statement. For instance, he alleged that LCAs pertaining to four new employees at his worksite were not posted. He also alleged that some other LCAs were posted at the corporate office but not at the worksite. But since Santiglia did not adequately prove these claims, the ALJ dismissed them. D. & O. at 9-10. A preponderance of evidence supports the ALJ's ruling.

The posting regulation requires that the employer post the notices "in at least two conspicuous locations at each place of employment where any H-1B nonimmigrant will be employed (whether such place of employment is owned or operated by the employer

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[7] *See* 20 C.F.R. § 655.730(c) (2) ("The employer shall file a separate LCA for each occupation in which the employer intends to employ one or more H-1B nonimmigrants, but the LCA may cover more than one intended position (employment opportunity) within that occupation."); 20 C.F.R. § 655.731(a)(2)(vi) ("Where a range of wages is paid by the employer to individuals in an occupational classification or among individuals with similar experience and qualifications for the specific employment in question, a range is considered to meet the prevailing wage requirement so long as the bottom of the wage range is at least the prevailing wage rate.").

or by some other person or entity)." 20 C.F.R. § 655.734(a)(1)(ii)(A). The purpose of the rule is to give adequate notice of the proposed hiring so that American workers will be aware of it and informed of their right to learn more about it and their right to file a complaint. D. & O. at 11. A "place of employment" is "the worksite or physical location where the work actually is performed" by the H-1B workers. 20 C.F.R. § 655.715.

Though Santiglia did not allege a violation of the "two conspicuous locations at each place of employment" rule, the ALJ found that Sun did not comply with this requirement because its "posting practice" was to post only one copy of the notice at the worksite and another copy at corporate headquarters. D. & O. at 11. An ALJ may impose appropriate civil money penalties for a "substantial" or "willful" failure to comply with the posting requirements. 8 U.S.C.A. §§ 1182 (n)(2)(C)(i), (ii). Santiglia urged the ALJ to find that Sun's posting violations were willful and substantial. Santiglia Brief at 34-35. A "willful failure" means "a knowing failure or a reckless disregard with respect to whether the conduct was contrary to [the Act] or §§ 655.731 or 655.732." 20 C.F.R. § 655.805(c). The ALJ found that the posting violation was not a willful failure because Sun did post two notices, though only one in the actual worksite. The ALJ also found that Sun's posting violations were not "substantial." Unlike "willful failure," the regulations do not define "substantial failure." Thus, the ALJ relied on the Black's Law Dictionary 1280 (5th ed. 1979) definition of the "substantial compliance rule" which is "compliance with the essential requirements, whether of a contract or statute." She concluded that since Sun had complied with the basic requirement to post two notices and had posted at least one in the worksite, the company had not substantially failed to comply with the rule. D. & O. at 15-16. We find that the ALJ carefully and reasonably exercised her discretion in concluding that civil money penalties were not warranted.

Public Access Violations

Santiglia alleged in his complaint that Sun had not given him suitable access to its LCA files at its Newark, California offices.[8] The Administrator did not find that Sun had violated this provision. The ALJ, however, concluded that Sun violated the Act when it refused to allow Santiglia access to its public LCA files between March 31, 2002, and July 29, 2002. D. & O. at 12. But she also concluded that this violation was not willful

[8] The employer shall make available for public examination, within one working day after the date on which an application under this paragraph is filed, at the employer's principal place of business or worksite, a copy of each such application (and such accompanying documents as are necessary). 8 U.S.C.A. § 1182 (n)(1). *See also* 20 C.F.R. § 655.705(c)(2) ("The employer shall maintain the original signed and certified LCA in its files, and shall make a copy of the LCA, as well as necessary supporting documentation (as identified under this subpart), available for public examination in a public access file at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the LCA is filed with ETA.").

or substantial and thus did not warrant civil money penalties under 8 U.S.C.A. § 1182 (n)(2)(C). Santiglia argues that not finding the access violation to be willful or substantial was error. Santiglia Brief at 8-11. The ALJ concluded that the access violation was not willful or substantial because Santiglia had access before March 31, 2002, and after June 29, 2002. Furthermore, Sun had denied Santiglia access to its public LCA files due to concerns that some of its employees raised regarding Santiglia's angry behavior when he previously reviewed Sun's LCA files. D. & O. at 7-8, 16-17; HT at 154-155, 157-160. We find the record fully supports the ALJ's findings and conclusion that the access violation was not willful or substantial.

Santiglia contends that Sun's explanation that it denied him access due to concerns its employees raised is based on hearsay testimony and is a pretext to excuse its willful and substantial violation. Santiglia Brief at 9-10, 12. But hearsay is admissible in administrative proceedings concerning the INA. *See* 20 C.F.R. § 655.825(b). Thus, the ALJ did not abuse her discretion when she permitted and considered the hearsay testimony.

Santiglia asserts that Sun did not provide him with documentation concerning the wage rate it paid to specific H-1B workers. Santiglia Brief at 12-19. He claims that this violates the regulation pertaining to records that the employer must make available to the public:

> The employer shall make a filed labor application and necessary supporting documentation available for public examination at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the labor condition application is filed with DOL. The following documentation shall be necessary:
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> (2) Documentation which provides the wage rate to be paid the nonimmigrant . . . .

20 C.F.R. § 655.760 (a)(2).

The ALJ characterized this regulation as ambiguous in the sense that it does not require an employer to make available to the public the specific wage rate it pays to specific H-1B workers, which is what Santiglia was seeking. The ALJ notes that the DOL regulations do not require employers to include the identity of their H-1B workers. She also cites 20 C.F.R. § 655.760(4), which requires the employer to make available:

> A copy of the documentation the employer used to establish the "prevailing wage" for the occupation for which the H-1B nonimmigrant is sought (a general description of the source and methodology is all that is required to be made available for public examination; the

> underlying *individual wage data* relied upon to determine the prevailing wage is not a public record, although it shall be made available to the Department in an enforcement action) . . . .

Emphasis added.

The ALJ interpreted this section of the regulation as according "confidential treatment" to "specific individual wage information." Therefore, she concluded that Sun did not unlawfully deny Santiglia access to salary information pertaining to specific workers because "while the wage rate to be paid a H-1B worker hired under an LCA must be made part of the public access records, there is no right of public access to the specific wage being paid a specific worker under the LCA." D. & O. at 13.

We find that the ALJ's interpretation of the regulation is reasonable. Moreover, Santiglia, who has the burden of proof, has not produced any evidence or authority to support his position. Therefore, we find that the ALJ properly concluded that Sun did not have to provide the specific wage rates paid to specific H-1B workers and thus did not violate the Act's public examination requirements.

CONCLUSION

Santiglia's motion to remand does not contain grounds for a new trial and is therefore **DENIED.** Furthermore, the ALJ correctly decided that Sun violated the INA's posting and public access requirements but did not do so substantially or willfully. Therefore, we **AFFIRM** her February 19, 2003 Order. With respect to the rest of Santiglia's allegations, we hold that the ALJ was correct as a matter of law in concluding that Santiglia had the burden of proving his allegations, that his allegation concerning "blanket" LCAs should be excluded, that the INS determines what "specialty occupations" are, and that Sun did not misrepresent facts in its LCAs. Moreover, we find that the ALJ did not abuse her discretion in ordering the proceedings on the second day of the hearing or in concluding that Sun did not willfully or substantially violate the posting and public access portion of the Act. Finally, the ALJ correctly dismissed the additional allegations concerning posting violations contained in Santiglia's prehearing statement because Santiglia did not prove them. Therefore, other than the posting and public access allegations, we **DISMISS** Santiglia's remaining claims.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge