IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2515

CYBERWORLD ENTERPRISE TECHNOLOGIES, INC.,
d/b/a TEKSTROM, INC.,

Plaintiff,

v.

JANET NAPOLITANO, Secretary,
Department of Homeland Security;
ERIC H. HOLDER, JR., Attorney General;
HILDA L. SOLIS, Secretary, Department of Labor;
MICHAEL AYTES, Acting Deputy Director, United States
Citizenship and Immigration Services,

Defendants.

On Appeal from the Decision of the United States
District Court for the District of Delaware

BRIEF FOR THE DEFENDANTS

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BRIEF FOR THE SECRETARY OF LABOR

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction over this case pursuant to 28 U.S.C. 1331 (federal question jurisdiction). The court issued its Memorandum Opinion on March 25, 2009 (Appendix ("App.") at 3), from which a timely notice of appeal

was filed by Cyberworld Enterprise Technologies, Inc., d/b/a Tekstrom, Inc. ("Cyberworld") on May 20, 2009 (App. at 1). This Court has jurisdiction under 28 U.S.C. 1291 (final decisions of district courts).

STATEMENT OF THE ISSUES

1. Whether, consistent with Supreme Court precedent, the district court correctly upheld the Administrative Review Board's final decision concluding that the Secretary was not deprived of the ability to pursue an H-1B action as a result of not meeting the procedural statutory requirement that she "shall" complete her investigation and issue a determination letter within 30 days of the filing of the complaint.

2. Whether, under the applicable H-1B statutory provision, the district court correctly upheld the Administrative Review Board's final decision concluding that debarment is mandatory because of Cyberworld's admitted failure to inquire of its secondary or other employers concerning the possible displacement of U.S. workers as a result of the placement of H-1B workers.

STATEMENT OF THE CASE

A. Course of Proceedings

This case arises under the Immigration and Nationality Act ("INA"), 8 U.S.C. 1101(a)(15)(H)(i)(b); 1182(n), as amended by the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"), Pub. L.

105-277, 112 Stat. 2681, and the applicable regulations at 20 C.F.R. 655, Subparts H and I. Following an August 9, 2001 complaint, Cyberworld was investigated by the Department of Labor ("DOL") Wage and Hour Division (App. at 5). The investigation revealed that, because Cyberworld was a "dependent" employer, it had violated the INA by failing to inquire of its "secondary" and "other" employers whether there might be a displacement of U.S. workers where the H-1B workers were to be placed (*id.*). Cyberworld admitted this violation (*id.*).[1]

On March 20, 2003, the Wage and Hour Administrator ("Administrator")[2] issued a determination letter ("Determination") to Cyberworld, in which a civil money penalty ("CMP") of $3,400 was assessed based on Cyberworld's H-1B violation involving 14 employees during the relevant period (App. at 5, 129; *see* Administrative Record ("AR") at 388, 390 (Joint Stipulations)). Cyberworld also was informed that the Attorney General ("AG")[3] would be notified in order to

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[1] As noted by the district court, there was no claim of actual displacement of U.S. workers (App. at 5).

[2] Because the Secretary of Labor ("Secretary") has delegated responsibility for enforcement of the H-1B provisions to the Wage and Hour Administrator, *see* Secretary's Order 4-2001, 66 Fed. Reg. 29,656 (May 31, 2001), they are referred to interchangeably in this brief.

[3] Although the Department of Homeland Security ("DHS") now performs the H-1B duties previously assigned to the AG, *see* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2195-97 (Nov. 25, 2002), because the statutory and regulatory provisions, as well as the legislative history, refer to the AG, this brief will continue to refer primarily to the AG.

impose the sanction of debarment on the company for at least one year, during which period Cyberworld's current "Labor Condition Applications" ("LCAs") would be invalidated and new ones would be denied (*id.* at 5-6, 130).[4]

Cyberworld requested an administrative hearing, arguing in part that, because of the Administrator's delay in issuing the Determination, DOL did not have "jurisdiction" to impose the debarment sanction (App. at 6). On September 25, 2003, the Administrative Law Judge ("ALJ") assigned to the case denied this contention (App. at 6, 133). On October 30, 2003, after they had filed cross-motions for summary judgment, the parties filed a Joint Stipulation of Undisputed Facts with the ALJ (Administrative Record at 388, 295, 370). The ALJ issued his Initial Decision and Order affirming the Administrator's Determination on December 23, 2003 (App. at 6, 142). Cyberworld appealed to the DOL Administrative Review Board ("Board"), which affirmed the ALJ's ruling on May 24, 2006 (App. at 6, 167). On June 26, 2006, Cyberworld appealed the Board's Final Decision and Order to the District Court for the District of Delaware (App. at 6). The district court granted the Secretary's motion for summary judgment on March 25, 2009 (App. at 4, 18). The appeal to this Court followed.

[4] The district court mistakenly stated that all current LCAs would be invalidated. However, as provided in the Determination, current LCAs are to be invalidated "with respect to future hires only"; for H-1B workers currently employed, these LCAs continue to be valid (App. at 130) (Determination).

B. Statement of Facts

Cyberworld is engaged in computer software development and consulting, and also provides computer maintenance and staffing services, for which it recruits and employs skilled nonimmigrant computer professionals (App. at 5, 40). Between January 19, 2001 and October 1, 2002, Cyberworld submitted 14 LCAs to DOL, in which it attested that it would comply with requirements relating to wages, working conditions, strikes or lockouts, and notice to any union and other workers; also, as an H-1B-dependent employer, Cyberworld attested that it would comply with the additional requirements regarding the possible displacement of U.S. workers in a secondary or other employer's workforce (including the requisite inquiry in that regard) (*id.* at 40-41).

During the relevant period, Cyberworld contracted with various vendors (other staffing businesses) to use the services of the 14 nonimmigrant H-1B employees (App. at 40).[5] In turn, the vendors placed the H-1B workers with their respective client businesses at the clients' worksites (*id.* at 40-41). At each of the worksites, the H-1B employees' working conditions had the indicia of an employment relationship with the client business (*id.* at 41).

Cyberworld failed to inquire whether the vendors, the vendors' clients, or its own client business displaced or intended to displace any similarly employed U.S.

[5] From August 6, 2001 to March 9, 2002, Cyberworld placed one of these H-1B nonimmigrant workers with one of its own clients (App. at 40 n.2).

worker beginning 90 days before and ending 90 days after the H-1B nonimmigrant's placement (*see* 20 C.F.R. 655.738(d)(4)) (App. at 41). It did not obtain any assurances from either the vendors or its own business client that there would be no displacement of U.S. workers, nor did it inquire of its vendors whether they sought such assurances from their client businesses at which H-1B nonimmigrant workers had been placed (*id.*). Further, none of Cyberworld's contracts with either its client business or any of its vendors included clauses requiring that no displacement of U.S. workers would occur, or requiring that the vendor seek such assurances from those businesses at which the H-1B nonimmigrant workers were placed (*id.*).

C. The ALJ's Decisions

1. On September 25, 2003, the ALJ rejected Cyberworld's "jurisdictional" defense in which Cyberworld argued that the Administrator's action was barred (App. at 133). At issue was whether the Administrator was foreclosed from proceeding against Cyberworld because he failed to comply with the statutory and regulatory provisions providing for the issuance of a determination within 30 days of the filing of a complaint. *See* 8 U.S.C. 1182(n)(2)(B); 20 C.F.R. 655.806(a)(3).

The ALJ, noting that the Board had previously addressed this issue, concluded that because the H-1B statute attaches no consequences to a failure to meet the 30-day time limit for completing the investigation and issuing a

determination letter, and because there was no relevant legislative history suggesting that the action should not go forward in these circumstances, the Administrator was not deprived of jurisdiction to proceed despite failing to meet the time limitation (App. at 138-39) (citing *United States Dep't of Labor v. Nurses PRN of Denver*, ARB No. 97-131, slip op. at 8 (June 30, 1999) (in turn, citing *Brock v. Pierce County*, 476 U.S. 253, 266 (1986))).[6]

2. The ALJ concluded in his December 23, 2003 decision that Cyberworld had violated the H-1B statute, *see* 8 U.S.C. 1182(n)(1)(F), in 14 instances by failing to make the required displacement inquiry of the secondary and other employers (and its own client), as it had attested on the LCAs it would do, or by taking any other steps to ensure that no improper displacement of U.S. workers was intended or had occurred (App. at 142, 151). Acknowledging that no U.S. worker or H-1B nonimmigrant was adversely affected by Cyberworld's failure to make the necessary inquiry, that Cyberworld had cooperated in the investigation, and that it had taken actions to ensure future compliance, the ALJ nevertheless concluded that the Secretary does not have discretion to forego notification to the AG to impose the statutory one-year debarment (App. at 159-62). In support of this conclusion, the ALJ referred to the mandatory term "shall" in the debarment section, 1182(n)(2)(C)(i)(I), and to the statutory emphasis on protecting U.S.

[6] Administrative cases cited in this brief may be accessed at http://www.dol.gov/arb.

workers in the scheme of sanctions (*id.*). For these reasons, the ALJ found insufficient reasons to depart from the Secretary's precedent in *Kolbusz-Kijne v. Technical Career Institute*, 1993-LCA-4 (Sec'y July 18, 1994) (supporting the reporting of the violation -- substantially failing to provide notice of the filing of the LCA, and filing an LCA which misrepresented a material fact -- to the AG for purposes of debarment) (App. at 162-63). Accordingly, the ALJ affirmed the Administrator's decision as set forth in the Determination -- $3,400 in CMPs and notification to the AG of the violations for purposes of imposing a one-year debarment (*id*).[7]

D. The District Court's Memorandum Opinion

1. Relying on the Supreme Court's decision in *Brock v. Pierce County*, 476 U.S. 253 (1986), the district court determined that procedural time limits, such as those for completing an investigation and issuing a determination letter, are not jurisdictional and, therefore, a failure to meet those time limits did not deprive the Secretary of the power to proceed in this case (App. at 11-12). The district court referred to the Supreme Court's statement that it was "reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action" (App. at 12, quoting *Pierce County*, 476 U.S. at 260).

[7] The Board affirmed the ALJ's decisions by incorporation (App. at 167).

The district court rejected Cyberworld's attempt to distinguish *Pierce County* on the ground that the Comprehensive Employment and Training Act ("CETA") scheme at issue in that case was complex and involved the protection of public rights, whereas the H-1B provisions are "simplistic" and do not involve the protection of public rights (App. at 12). Rather, the court stated that the legislative history accompanying the H-1B statutory scheme, as detailed in the Preamble to the Interim Final Rule, 65 Fed. Reg. 80,110 (Dec. 20, 2000) ("Preamble"), indicates otherwise (*id.* at 12-13).

The district court also rejected Cyberworld's claims that it was "unduly prejudiced" by the DOL delay and that the doctrine of laches should apply (App. at 13). Cyberworld had argued that it might have been able to utilize witnesses in support of its argument regarding knowledge of events at the time (App. at 13). The court emphasized, however, that because Cyberworld had admitted its violation, and the facts before the ALJ and Board had been stipulated (on summary judgment), there was no need for witness testimony (*id.*). The court further referred to the general rule set out in *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917), that laches or a neglect of duty on the part of the government officers is no defense against the government's suit to enforce a public right or to protect a public interest (*id.*).

2. The district court next addressed Cyberworld's assertions that the DOL had erred by concluding that debarment was mandatory under 8 U.S.C. 1182(n)(2)(C) for an employer's failure to make the secondary displacement inquiry (App. at 14-18). Noting the seeming inconsistency in treating the word "shall" differently in two parts of the statute, the district court again relied on *Pierce County* to explain that the lack of consequences for failure to adhere strictly to time limits provisions -- a procedural requirement -- should be contrasted with the penalty provision of debarment (which uses the word "shall") for failure to comply with the secondary displacement inquiry provision -- a substantive requirement (*id*). The court found no caselaw to support the "permissive" use of the word "shall" in a substantive context such as a mandate for debarment (*id.* at 15-16).

The district court also found "no support" in the statute or regulations for Cyberworld's argument (advanced in the debarment context) that knowledge of where the H-1B worker will be placed is a prerequisite to the secondary displacement inquiry requirement (App. at 16). In this regard, the district court quoted the regulation at 20 C.F.R. 655.738(d)(5)(i), which lists various options to satisfy the "due diligence" that the employer must exercise, and the "reasonable effort" it must make, to ensure that its vendors or clients comply with the secondary displacement inquiry requirement. These include securing written assurances from its other/secondary employers, retaining contemporaneous

memoranda of any oral assurances by the other/secondary employers, or incorporating a secondary displacement clause in the contract between the H-1B employer and any "downstream employers," ensuring that there be no displacement of similarly employed U.S. workers within the prescribed period (App. at 17). These provisions, the court concluded, do not contain or support any knowledge component.[8]

The district court therefore granted the Secretary's motion for summary judgment.

SUMMARY OF THE ARGUMENT

As a dependent employer under H-1B, Cyberworld was required, by statute and regulation, to inquire of its secondary or other employers whether they had displaced or intended to displace any U.S. workers within 90 days before and after the placement of an H-1B worker at the worksite of such secondary or other employer. Cyberworld admitted (by stipulation) that it failed to make such inquiry. Despite this clear violation of the H-1B statutory and regulatory provisions, Cyberworld nevertheless contends that the Secretary was without

[8] The district court emphasized that the displacement inquiry is not limited to the H-1B employer's immediate vendors or clients; rather, the regulation at 20 C.F.R. 655.738(d)(3) states that the secondary or other employer "would often be (but is not limited to) the client or customer of an H-1B employer that is a staffing firm or a service provider which offers the services of H-1B nonimmigrants under a contract" (App. at 16). The court also emphasized that the regulation at 20 C.F.R. 655.738(d)(3) states that the obligation to make the inquiry, and the consequences of any failure to do so, rest solely with the employer (*id.* at 16-17).

authority to pursue monetary penalties or debarment because her investigation was not completed and the Determination was not issued within the 30-day statutory limitation period, and that even if she could pursue an action, debarment was not warranted. Neither contention has merit.

1. The district court, relying on the Supreme Court's decision in *Brock v. Pierce County*, 476 U.S. 253 (1986), correctly upheld the Board's final decision concluding that the Secretary was not deprived of her authority to act because the 30-day statutory time limit specified in the H-1B statute at 8 U.S.C. 1182(n)(2)(A) for issuing a Determination following an investigation was not met. In *Pierce County*, the Court articulated the general principle that unless a statute requiring an action to occur within a particular time frame also incorporates a consequence for failure to comply with that time requirement, a government agency does not lose the power to act. *See* 476 U.S. at 259. Significantly, the Supreme Court was "reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action." *Id*. at 260. This principle has been followed by this Court. *See, e.g.*, *Shenango Inc. v. Apfel*, 307 F.3d 174, 193 (3d Cir. 2002). Therefore, the fact that the Secretary's issuance of the Determination did not meet the 30-day statutory time limit (which contains no consequences for a failure to adhere to it) did not foreclose the Secretary from pursuing the available remedies for Cyberworld's admitted violation of the statute and regulations.

2. The plain language of the statute requires debarment for at least one year for dependent employers that fail to make the requisite secondary displacement inquiry. Cyberworld admitted to failing to make such inquiries; debarment was therefore mandatory.

STANDARD OF REVIEW

When reviewing the final decision of an administrative agency under the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2), this Court reviews a district court's grant of summary judgment de novo and "appl[ies] the appropriate standard of review to the agency's decision." *Concerned Citizens Alliance, Inc. v. Slater*, 176 F.3d 686, 693 (3d Cir. 1999). Pursuant to section 706(2) of the APA, this Court will set aside an agency's findings and conclusions only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, . . . [or] unsupported by substantial evidence." 5 U.S.C. 706(2)(A) and (E); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Albert Einstein Medical Center v. Sebelius*, 566 F.3d 368, 372 (3d Cir. 2009). The two issues presented here -- whether failure to meet a 30-day procedural deadline prohibits DOL from pursuing an action and whether debarment is mandatory -- are legal issues which should be reviewed by this Court de novo.[9]

[9] The Secretary is relying on Supreme Court precedent for the statutory time limit issue and on the plain language of the statute for the debarment issue. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the

STATUTORY AND REGULATORY FRAMEWORK

1. The H-1B visa program is a voluntary program that permits employers to secure and employ nonimmigrants on a temporary basis to fill specialized jobs in the United States. *See* 8 U.S.C. 1101(a)(15)(H)(i)(b). The INA requires that an employer pay an H-1B nonimmigrant the higher of its actual wage or the locally prevailing wage. *See* 8 U.S.C. 1182(n)(1)(A). The prevailing wage provisions safeguard against the erosion of United States workers' wages and moderate any economic incentive or advantage in hiring temporary foreign workers. *See, e.g.*, H.R. Rep. No. 106-692, 106th Cong., 2d Sess. (2000) (discussion of the Labor Department's 1996 Office of Inspector General report). Under the INA as amended,[10] an employer seeking to hire an alien in a specialty occupation,[11] or as a

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intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Concerning the time limitation issue, the Secretary also relies on the adoption by the Board (as adjudicator) of Supreme Court precedent. *See United States v. Mead*, 533 U.S. 218, 229-30 (2001).

[10] Section 212(n) of the INA, 8 U.S.C. 1182(n), was amended by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978; the ACWIA; the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733; the American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251; and the H-1B Reform Act of 2004, Pub. L. No. 108-447, 118 Stat. 2798 (2004).

[11] The INA defines a "specialty occupation" as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher. *See* 8 U.S.C. 1184(i)(1).

fashion model of distinguished merit and ability, must seek and obtain permission from the Department of Labor, by submitting an LCA, before the alien may obtain an H-1B visa. *See* 8 U.S.C. 1182(n)(1).

In its LCA application to the Labor Department, an employer attests that:

> (A) The employer --
>
> (i) is offering and will offer [the H-1B worker] during the period of authorized employment . . . wages that are at least --
>
> (I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or
>
> (II) the prevailing wage level for the occupational classification in the area of employment,
>
> whichever is greater, based on the best information available as of the time of filing the application.

8 U.S.C. 1182(n)(1)(A) (emphases added).

DOL is required to certify the LCA within seven days unless it is incomplete or contains "obvious inaccuracies." 8 U.S.C. 1182(n)(1), unmarked paragraph preceding 8 U.S.C. 1182(n)(2). Only after the employer receives DOL's certification, may the Immigration and Naturalization Service ("INS")[12] approve an

[12] As mentioned *supra*, pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2195-97, the adjudication of immigrant visa petitions was transferred from the INS to the U.S. Citizenship and Immigration Services.

H-1B petition seeking authorization to employ a specific nonimmigrant worker. *See* 8 U.S.C. 1101(a)(15)(H)(i)(b); 20 C.F.R. 655.700(a)(3).

The statute also prescribes a framework for enforcement proceedings and sanctions, directing DOL to

> establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application submitted under [this Act] or a petitioner's misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). . . . The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

8 U.S.C. 1182(n)(2)(A). DOL has promulgated regulations that provide detailed guidance regarding the determination, payment, and documentation of the required wages. *See* 20 C.F.R. 655.700 *et seq.* Remedies for violations of the statute or regulations include payment of back wages to H-1B workers. *See* 8 U.S.C. 1182(n)(2)(D); 20 C.F.R. 655.810(a). CMPs may also be assessed for certain violations (including, as discussed *infra*, the failure to inquire of secondary or other employers about the displacement of U.S. workers). *See* 8 U.S.C. 1182(n)(2)(C); 20 C.F.R. 655.810(b).

2. The ACWIA requires that H-1B-dependent employers[13] comply with certain additional LCA attestations regarding non-displacement and recruitment obligations. *See* 8 U.S.C. 1182(n)(1)(E), (F), (G); 20 C.F.R. 655.738, 655.739; 65 Fed. Reg. at 80,140-43 (Preamble). These additional attestations state that the employer (1) did not displace and will not displace a United States worker within the period beginning 90 days before, and ending 90 days after, the date of the filing of any visa petition supported by the LCA, 8 U.S.C. 1182(n)(1)(E)(i); (n)(2)(E); (2) will not place the nonimmigrant with certain other employers unless an inquiry has been made as to whether the other employer has displaced or intends to displace a U.S. worker during the period 90 days before or after the placement of the H-1B worker, 8 U.S.C. 1182(n)(1)(F);[14] (3) has taken good faith steps to recruit

[13] The term "H-1B-dependent employer" is defined in both the statute and the regulations. 8 U.S.C. 1182(n)(3)(A); 20 C.F.R. 655.736; *see* 8 U.S.C. 1182(n)(1)(E)(ii). The definition is based on a formula for comparing the number of H-1B nonimmigrants employed with the number of full-time-equivalent employees in the employer's workforce.

[14] Section (1)(F) provides that

> the employer will not place the nonimmigrant with another employer . . . where -- (i) the nonimmigrant performs duties . . . at one or more worksites owned, operated, or controlled by such other employer; and (ii) there are indicia of an employment relationship between the nonimmigrant and such other employer; unless the employer has inquired of the other employer as to whether, and has no knowledge that, within the period beginning 90 days after the date of the placement of the nonimmigrant with the other employer, the other employer has displaced or intends to displace a United States worker.

U.S. workers for the jobs for which the H-1B workers are sought, 8 U.S.C. 1182(n)(1)(G)(i)(I); and (4), has offered the job to any U.S. worker who applies and is equally or better qualified than the nonimmigrant 8 U.S.C. 1182(n)(1)(G)(i)(II). Thus, these LCA attestations for H-1B-dependent employers

> impose certain obligations to recruit U.S. workers, to offer the job to U.S. applicants who are equally or better qualified than the H-1B nonimmigrant(s) sought for the job, and to avoid the displacement of U.S. workers (either in the employer's workforce, or in the workforce of a second employer with whom the H-1B nonimmigrant(s) is placed, where there are indicia of employment with a second employer).

20 C.F.R. 655.705(c)(1) (citation omitted).[15]

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8 U.S.C. 1182(n)(1)(F) (emphases added); *see* 20 C.F.R. 655.738(d)(5). The Department's regulations state that the other/secondary employer

> would often be (but is not limited to) the client or customer of an H-1B employer that is a staffing firm or a service provider which offers the services of H-1B nonimmigrants under a contract . . . . Only the H-1B employer placing the nonimmigrant with the secondary employer is subject to the non-displacement obligation on the LCA, and only that employer is liable in an enforcement action pursuant to subpart I of this part if the other/secondary employer, in fact, displaces any of its U.S. worker(s) during the applicable time period.

20 C.F.R. 655.738(d)(3). The secondary displacement inquiry requirement is distinct from the prohibition against actual displacement. *Compare* 8 U.S.C. 1182(n)(1)(E) *with* 8 U.S.C. 1182(n)(1)(F).

[15] Indicia of such an employment relationship between the nonimmigrant and the secondary/other employer include the business' right to fire the H-1B nonimmigrant worker, to assign work, to control the manner, method, and duration of the work; in addition, the work is to be performed at the business' worksite and the business furnishes the equipment and supplies. *See* 20 C.F.R. 655.738(d)(2)(ii).

The H-1B-dependent employer has some flexibility as to how it chooses to satisfy its non-displacement obligations, as the district court set forth in explicit detail (App. at 16-18). It is required to exercise "due diligence" and to engage in reasonable efforts to inquire about potential secondary displacement, through methods which may include, but are not limited to, securing and retaining written assurances from the secondary or other employer; maintaining memoranda in its files regarding oral commitments made by those employers; or including a secondary displacement clause in a contract with the secondary or other employer. *See* 20 C.F.R. 655.738(d)(5)(i). However, in discussing the employer's obligations, the Preamble states: "While a dependent employer has discretion as to how it will meet this obligation, it must make the inquiry in every case where there will be indicia of an employment relationship." 65 Fed. Reg. at 80,151 (emphases added).

3. An H-1B-dependent employer's failure to make the displacement inquiry of a secondary or other employer before placement of an H-1B worker is a violation for which at least a one-year debarment must be imposed by the AG. *See* 8 U.S.C. 1182(n)(2)(C)(i)(I), (II). The statute states:

> If the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B), (1)(E), or (1)(F) . . .
>
> > (I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per violation) as the Secretary determines to be appropriate; and

> (II) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) of this title during a period of at least 1 year for aliens to be employed by the employer.

8 U.S.C. 1l82(n)(2)(C)(i) (emphases added). The regulations also provide that the mandatory penalty for violation of the displacement prohibitions of section 655.738, including making secondary inquiries, is at least a one-year debarment. The regulation specifically states:

> The Administrator shall notify the Attorney General pursuant to §655.855 that the employer shall be disqualified from approval of any petitions filed by, or on behalf of, the employer pursuant to section 204 or section 214(c) of the INA for the following periods:
>
> > (1) At least one year for violation(s) of any of the provisions specified in paragraph (b)(1)(i) [displacement] through (iii) of this section.

20 C.F.R. 655.810(d)(1) (emphases added).

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY UPHELD THE BOARD'S FINAL DECISION CONCLUDING THAT THE SECRETARY COULD PURSUE AN H-1B ACTION DESPITE HAVING FAILED TO MEET THE PROCEDURAL STATUTORY REQUIREMENT THAT SHE "SHALL" COMPLETE HER INVESTIGATION AND ISSUE A DETERMINATION LETTER WITHIN 30 DAYS OF THE FILING OF THE H-1B COMPLAINT

1. As set forth *supra*, the H-1B statute provides that the Secretary is to establish a process for the receipt, investigation, and disposition of

complaints of LCA violations. *See* 8 U.S.C. 1182(n)(2)(A). In relevant part, the statute states:

> [T]he Secretary shall provide, within 30 days after the date . . . a complaint is filed, for a determination as to whether or not a reasonable basis exists to make a finding described in subparagraph (C). If the Secretary determines that such a reasonable basis exists, the Secretary shall provide for notice of such determination to the interested parties and an opportunity for a hearing on the complaint, in accordance with section 556 of title 5, United States Code, within 60 days after the date of the determination. If such a hearing is requested, the Secretary shall make a finding concerning the matter by not later than 60 days after the date of the hearing. . . .

8 U.S.C. 1182(n)(2)(B); see 20 C.F.R. 655.806(a)(3). However, because this statutory provision does not set forth any consequences for the failure to meet this deadline, the Secretary was not deprived of her ability to pursue her action against Cyberworld because the time limit was not met.

The governing principles for the interpretation of limitations periods were set out by the Supreme Court in *Brock v Pierce County*, 476 U.S. 253 (1986). *Pierce County* concerned whether the Secretary of Labor was deprived of "jurisdiction" because of her failure to meet a 120-day statutory deadline in CETA, which provided that the Secretary "shall" make a determination within the specified period. *Id*. at 254-55. The Supreme Court explained that its precedents provide support for the view that government agencies do not lose the power to pursue an action because of a failure to comply with statutory time limits unless the statute "<u>both</u> expressly requires an agency or public official to act within a

particular time period and specifies a consequence for failure to comply with the provision." *Id*. at 259 (emphases in original; citations omitted).[16] It further stated that "the proposition that Congress intended the Secretary to lose the authority to recover misspent funds 120 days after learning of the misuse 'is not, to say the least, of the sort that commands instant assent.'" 476 U.S. at 258 (quoting *St. Regis Mohawk Tribe, N.Y. v. Brock*, 769 F.2d 37, 41 (2d Cir. 1985)). The Supreme Court emphasized that "[w]e would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." 476 U.S. at 260 (footnote omitted). In this connection, the Supreme Court stated that it "has frequently articulated the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Id*.[17]

The reasoning articulated in *Pierce County* has been followed consistently under various statutes. *See, e.g., United States v. James Daniel Good*, 510 U.S. 43, 63-64 (1993) (civil forfeiture; characterizing the *Pierce County* conclusion as a

[16] The Court did state, however, that "[w]e need not, and do not, hold that a statutory deadline for agency action can never bar later action unless that consequence is stated explicitly in the statute." *Pierce County*, 476 U.S. 262 n.9.

[17] Cyberworld attempts to distinguish *Pierce County* by minimizing the actions required of the Secretary within the 30-day time frame (Br. at 22-24). This argument misses the point. As shown *supra*, the reasoning of *Pierce County* does not rest on what is required to be accomplished within the prescribed time period.

holding); *United States v. Montalvo-Murillo*, 495 U.S. 711, 717-21 (1990) (Bail Reform Act); *Shenango Inc. v. Apfel*, 307 F.3d 174, 193 (3d Cir. 2002) (Coal Act); *Southwestern Pa. Growth Alliance v. Browner*, 121 F.3d 106, 113-15 (3d Cir. 1997) (Clean Air Act); *see also United States Dep't of Labor v. Nurses PRN of Denver*, ARB No. 97-131, slip op. at 8 (June 30, 1999) (H-1A). Indeed, in *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003), the Supreme Court emphasized that, since its decision in *Pierce County*, it has never construed a provision stating that the Government "shall" act within a specified time, without more, as a "jurisdictional" limit precluding subsequent action. Cyberworld has not argued to the contrary.[18]

2. Contrary to Cyberworld's argument (Br. at 20-27), the H-1B statute clearly is concerned with public rights -- an important rationale underlying the Supreme Court's decision in *Pierce County*. As a voluntary program, the statute permits employers to obtain and employ nonimmigrants on a temporary basis to fill specialized jobs in the United States. *See* 8 U.S.C. 1101(a)(15)(H)(i)(b). In order to make available to employers the services of qualified nonimmigrant aliens

[18] It is noteworthy that the H-1B statute is complaint driven. *See* 8 U.S.C. 1182(n)(2)(A). To deprive the Secretary of "jurisdiction" because of a failure to meet a procedural statutory deadline would deprive injured complainants of redress. As the Supreme Court stated in *Pierce County*, "[section] 106(b) [of CETA] cannot be jurisdictional, because it would then permit the Secretary's inaction to prejudice individual complainants seeking to enforce their rights under CETA." 476 U.S. at 262.

to aid in fulfilling employment needs where there is a shortage of U.S. workers with the requisite skills, Congress enacted a detailed statutory scheme that takes into consideration the need to meet the country's employment requirements while at the same time protecting U.S. citizens (*see* Statutory and Regulatory Framework *supra*).

In particular, the important public policy objective of safeguarding U.S. workers was reflected in the formulation of the non-displacement obligation. For example, Senator Spencer Abraham, the sponsor of the Senate bill, stated that the new attestation requires a covered employer "to promise to inquire" whether the "other" employer will be using the H-1B worker to displace a U.S. worker whom the "other" employer has laid off or intends to lay off within 90 days of the placement of the H-1B worker. 144 Cong. Rec. S12751 (Oct. 21, 1998) (statement of Sen. Abraham). The covered employer must also attest "that it has no knowledge that the other employer has done so or intends to do so." *Id.*[19]

[19] Cyberworld's contention (Br. at 38-39), in an apparent attempt to refute that there are public rights at stake, that the H-1B statute provides for penalties only against private employers for violations of a "private license" is mistaken. H-1B workers include, for example, physicians and therapists in municipal, state, and federal agencies, *see e.g., Talukdar v. U.S. Dep't of Veterans Affairs*, ARB No. 04-100 (Jan. 31, 2007), and *United States Dep't of Labor v. Dallas [VA] Medical Center*, ARB No. 01-077, 01-081 (Oct. 30, 2003); university professionals, *see, e.g., Kolbusz-Kijne*, *supra*, and *Wakileh v. Western Ky. University*, ARB No. 04-013 (Oct. 20, 2004); and public school teachers, *see, e.g., Administrator v. Teachers Placement Group*, ARB No. 04-085 (Sept. 23, 2004).

Indeed, Congress was especially troubled by the numerous "job shops" -- like Cyberworld -- that would recruit foreign workers and send them to work for other companies. Congress believed that the protections of U.S. workers (and protection of H-1B employees against exploitation) were being adversely affected by the prevalence and practices of these job shops.[20] Thus, the legislative history includes an excerpt from an audit by DOL's Office of Inspector General criticizing job shops, which are "companies which hire predominantly, or exclusively, H-1B aliens then contract out these aliens to other employers. The current H-1B law does not prohibit this practice; however, there is a concern that these job shops are paying the H-1B aliens less than prevailing wage, making contracting out with job shops more appealing to the U.S. employer." *See* H.R. Rep. No. 105-657, 105th Cong., 2d Sess. at 10 (1998) (quoting Office of the Inspector General, U.S. Department of Labor, *Final Report: The Department of Labor's Foreign Labor Certification Programs: The System is Broken and Needs to be Fixed*, 21, 25-27 (May 22, 1996)).

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[20] "The employers most prone to abusing the H-1B program are called 'job contractors' or 'job shops.' Much, or all, of their workforces are composed of foreign workers on H-1B visas. Many of these companies make no pretense of looking for American workers and are in business to contract their H-1Bs out to other companies. The companies to which the H-1Bs are contracted benefit in that the wages paid to the foreign workers are often well below what comparable Americans would receive. Also, the companies are not required to shoulder the obligations of being the legally recognized employers -- the job contractors/shops remain the official employers." 144 Cong. Rec. E2323 (Nov. 12, 1998) (remarks of Rep. Lamar S. Smith); *see* 65 Fed. Reg. at 80,144.

In his remarks, Congressman Smith focused on the connection between job shops and the secondary displacement inquiry: "In enacting this provision, Congress intends that the employer make a reasonable inquiry and give due regard to available information. Simply making a pro forma inquiry would not insulate a covered employer from liability should [the] 'other' employer displace an American worker [from] a job sufficiently similar to the one which would be performed by an H-1B worker." 144 Cong. Rec. at E2324. Congressman Smith emphasized that an employer "must exercise due diligence in meeting its responsibilities regarding the secondary employer." *Id.*; *see* App. at 15-18. Thus, the public policy goals underlying the H-1B provisions in general, and the secondary displacement inquiry requirement in particular, is manifest.

Therefore, the district court, upholding the Board's decision, properly concluded that DOL's failure to meet the procedural statutory deadline for completion of the investigation and issuance of the Determination did not deprive it of the authority to pursue an action.

3. The district court correctly rejected Cyberworld's contentions that it was "severely prejudiced" by the delay between the onset of the investigation and issuance of the Determination (App. at 13). As an initial matter, the fact that Cyberworld admitted it violated the secondary displacement inquiry (it did not, for example, challenge the CMP) renders any contention of prejudice as a result of

delay unpersuasive. Moreover, the Supreme Court has stated that "[a]s a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *cf. OPM v. Richmond*, 496 U.S. 414, 422 (1990) (the Supreme Court has "reversed every finding of estoppel [against the government] that [it has] reviewed"). Finally, in *Pierce County*, the Supreme Court emphasized that when "there are less drastic remedies available . . . , courts should not assume that Congress intended the agency to lose its power to act." 476 U.S. at 260. The Court pointed out that, in accordance with the APA, an "aggrieved" person could bring an action in district court seeking to "'compel agency action unlawfully withheld or unreasonably delayed.'" *Id.* at 260 n.7 (quoting 5 U.S.C. 706(1)). Cyberworld, however, took no such action. Thus, the district court's conclusion that Cyberworld did not suffer prejudice as a result of any delay was correct.

II.

THE DISTRICT COURT PROPERLY UPHELD THE BOARD'S FINAL DECISION CONCLUDING THAT DEBARMENT UNDER THE H-1B STATUTE IS MANDATORY BECAUSE OF CYBERWORLD'S ADMITTED FAILURE TO MAKE THE REQUISITE DISPLACEMENT INQUIRY OF ITS SECONDARY OR OTHER EMPLOYERS

On its 14 LCAs, Cyberworld specifically attested that it would make the required displacement inquiries of secondary or other employers; yet, by its own

admission (*see* Br. at 41 -- referring to "a technical violation" of the secondary displacement inquiry), it failed to do so. The H-1B statute states unequivocally that an H-1B-dependent employer's failure to make the displacement inquiry of a secondary or other employer before placement of an H-1B worker requires at least a one-year debarment. *See* 8 U.S.C. 1182(n)(2)(C)(i)(I), (II). Specifically, section 1182(n)(2)(C)(i) provides that

> [i]f the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph . . . (1)(F) [the secondary displacement inquiry requirement],
>
> (I) the Secretary shall notify the Attorney General of such finding . . . ; and
>
> (II) the Attorney General shall not approve petitions filed with respect to that employer . . . during a period of at least 1 year.

8 U.S.C. 1182(n)(2)(C)(i)(I), (II) (emphases added); *see* 20 C.F.R. 655.810(d)(1); *Kolbusz-Kijne*, *supra,* slip op. at 8 (Secretary reduced CMPs for H-1B violation but, citing 8 U.S.C. 1182(n)(2)(C), mandated debarment). Thus, in accordance with the plain language of the statutory provision, whenever the Secretary determines that there was a failure on the part of an H-1B employer to inquire of secondary or other employers as to the displacement of U.S. workers, she must

notify the AG, who then cannot approve petitions from the employer for at least a one-year period.[21]

Nothing in the legislative history suggests that Congress intended the term "shall" to have anything other than a mandatory meaning in this context.[22] The use of "shall" in the context of a procedural limitation period (which does not preclude the government from pursuing an action) is distinguishable from the use of "shall" in the context of a substantive provision, such as one calling for debarment for a failure to make a secondary displacement inquiry. *See Pierce County*, 476 U.S. at 260 (focusing on the procedural nature of the requirement); *see also Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 559 (3d Cir. 2003) (while "'there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning,' . . . [t]hat presumption may be overcome . . . when 'there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent'") (quoting *Atlantic*

[21] The AG must also invalidate current LCAs as to new hires, and cannot permit extensions for current H-1B workers; as indicated *supra*, however, current employees are not otherwise affected (*see* App. at 130).

[22] Cyberworld's citation to legislative history (*see, e.g.*, Br. at 43) prior to the enactment of ACWIA is of no probative value because it is ACWIA which places for the first time under the INA the requirements on dependent employers, including the secondary/other employer displacement inquiry requirement.

Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932)). Likewise, nothing in the regulations or Preamble to the regulations suggests that either the Secretary or the AG has any discretion to modify or waive the requirement of debarment where an H-1B-dependent employer has failed to make the required secondary displacement inquiry.[23]

In this connection, Cyberworld cites (Br. at 54-55) *Asika v. Ashcroft*, 362 F.3d 264, 268 n.4 (4th Cir. 2004), to support its argument as to the existence of discretion in connection with debarment. *Asika* is inapposite. That case stands for the proposition that even if an INA provision can be interpreted as establishing a five-year limitation on the AG's power to rescind a wrongfully granted status adjustment, that limitation does not extend to the AG's power to deport, because the AG's reasonable interpretation of an ambiguous statutory provision warrants deference. *See Asika*, 362 F.3d at 269-71. There is absolutely no ambiguity in the mandatory statutory debarment provision at issue here. Cyberworld's reliance (Br. at 54) on *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) is similarly misplaced. *Heckler v. Chaney* precludes a court from reviewing an agency decision not to enforce where that decision is "committed to agency discretion," 5 U.S.C.

[23] *Compare* 20 C.F.R. 655.810(d)(1) (mandatory debarment for a period of at least one year) *with* 20 C.F.R. 655.810(c) (listing mitigating factors that the Administrator will consider in determining the amount of CMPs to be assessed).

701(a)(2). Here, the agency was obligated to enforce the debarment provision based on the plain statutory language.

Additionally, Cyberworld reiterates an argument (Br. at 48-52) that was rejected by the ALJ -- that, because the Determination failed to cite the proper section of the regulations dealing with debarment for a failure to inquire regarding the displacement of U.S. workers, 20 C.F.R. 655.810(d)(1), it could not be debarred (App. 153-54). Section 655.815(c) of the regulations state, however, that the written determination required by section 655.805 shall "[s]et forth the determination of the Administrator and the reason or reasons therefor, and in the case of a finding of violation(s) by an employer, prescribe any remedies, including the amount of any back wages assessed, the amount of any civil money penalties assessed and the reason therefor, and/or any other remedies assessed." 20 C.F.R. 655.815(c). The Determination did in fact set forth the reasons for the penalty ("failed to make the required displacement inquiry of the secondary employer"), prescribed the precise amount of the CMP ($3,400), and the specific remedy of debarment ("[T]he Attorney General (AG) shall be notified of the occurrence of this violation when this determination becomes final [whereupon at least a one year debarment shall be imposed].") (App. at 129-30). Cyberworld was therefore on notice of the violations it was alleged to have committed, as well as the

remedies and sanction sought.[24] In sum, Cyberworld cannot escape the statutorily mandated sanction of a one-year debarment.

[24] Despite acknowledging that it violated the secondary displacement inquiry requirement, Cyberworld, in the context of arguing that debarment was not warranted, claims (Br. at 41-48) that it could not have made the inquiry of the businesses in which its H-1B employees were placed because they were placed there by vendors without Cyberworld's knowledge. First, Cyberworld was not relieved of complying with the non-displacement inquiry provisions because its vendors were intermediary businesses serving staffing functions; there was no intention to limit the secondary displacement inquiry requirements to an H-1B employer's immediate clients. *See* 20 C.F.R. 655.738(d)(3). Thus, where there are "secondary" and "other" employers with which H-1B nonimmigrants are placed and which have the indicia of an employment relationship with those workers, the responsibility to make the inquiry applies, irrespective of how far down the line the placement occurs. Second, as the district court emphasized, the statutory requirement to inquire, at 8 U.S.C. 1182(n)(1)(F), "has no knowledge element" (App. at 16-17). Failure to comply with the applicable LCA condition (incorporating the statutory and regulatory requirements) is a violation that leads inescapably to at least a one-year debarment sanction.

Furthermore, Cyberworld, which had identified the employers with which it placed its H-1B workers as vendors, surely knew that the H-1B employees were, in turn, to be placed by its vendors (and very likely within a short time) with other employers. In fact, the LCAs explicitly require an attesting employer to specify the prevailing wage for the location at which each H-1B worker will be placed. *See* 8 U.S.C. 1182(n)(1)(A)(II); (n)(4)(A). Cyberworld could not have complied with its attestations regarding the locally prevailing wage and geographic places of employment without knowing where these workers were being placed. Thus, it was incumbent on Cyberworld to make the requisite inquiry and to seek assurances that there would be no displacement of U.S. workers. *Cf.* 65 Fed. Reg. at 80,187-88 (regardless of whether an employer is taking advantage of short-term placement options, it must be vigilant in maintaining its compliance by being aware of the locations of its H-1B workers).

CONCLUSION

For the reasons stated, this Court should affirm the district court's decision granting summary judgment to the Secretary.

Dated:

Respectfully submitted,

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