ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, DC 20210

In the Matter of:	
ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR,	
Prosecuting Party,	ARB Case No. 03-140 ALJ Case No. 03-LCA-15
v.	
KEN TECHNOLOGIES, INC.,	
Respondent.	

STATEMENT OF THE WAGE AND HOUR ADMINISTRATOR IN RESPONSE TO PETITION FOR REVIEW

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Pursuant to the Notice of Intent to Review issued by the Administrative Review Board ("Board") on September 11, 2003, the Administrator of the Wage and Hour Division, through counsel, responds to the brief filed by Petitioner, Ken Technologies, Inc. The Administrator seeks affirmance of the Decision and Order of Administrative Law Judge ("ALJ") Janice K. Bullard, issued on July 18, 2003, in this case arising under the Immigration and Nationality Act of 1990, as amended ("INA"), 8 U.S.C. 1101(a)(15)(H)(i)(B), 1182(n), and the applicable regulations at 20 C.F.R. 655, Subparts H and I.

ISSUE PRESENTED

Whether the ALJ properly determined that Ken Technologies is liable for $15,233.81 in unpaid wages because it failed to pay its employee, Jorige Chandrasekhar Prasad, the wages due under the terms of a Labor Condition Application ("LCA"), as provided in 20 C.F.R. 655.731(c)(7), during a period when Ken Technologies did not assign Prasad any work and did not effect a bona fide termination of his employment.

STATEMENT OF THE CASE

A. Course Of Proceedings And Statement Of Facts

Ken Technologies, a New Jersey corporation, is a computer consulting business (ALJ Decision and Order ("D&O") 3). In May 2000, Ken Technologies petitioned the Immigration and Naturalization Service ("INS")[1] for approval of a petition for the employment of Prasad as a program analyst at a prevailing rate of $45,700 per year, according to the LCA filed with and certified by the Department of Labor pursuant to 8 U.S.C.

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[1] Pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002), adjudication of immigrant visa petitions was transferred from the INS to the Bureau of Citizenship and Immigration Services of the Department of Homeland Security. The Bureau's name has since been changed to "U.S. Citizenship and Immigration Services," or "USCIS." *See* West Interpreter Releases, 80 Interrel 1244 (No. 34, Sept. 8, 2003). The acronym "INS" is used in this brief because the INS was the responsible agency during the relevant period.

1182(n)(1), 20 C.F.R. 655.700(a)(3) and 655.740 (*see* Administrator's Exhibits ("AX") 1, 2).

Prasad arrived in the United States on February 18, 2001, and he left the country to return to India on July 17, 2001. During this entire period, Prasad was not given any work assignment, lived in a guest house owned by Ken Technologies, and was paid a total of only $350 (AX 5). Based on a July 5, 2001 complaint by Prasad that he was not paid the wages to which he was entitled for the period of his alleged employment, despite its consisting of nonproductive time, the matter was investigated by Wage and Hour. On February 3, 2003, the Administrator issued a Determination Letter in which she found that Ken Technologies had committed two violations of the H-1B requirements -- failure to pay proper wages to Prasad and failure to provide notice to its employees that it had filed an LCA.[2]

A hearing, requested by Ken Technologies, was held on March 31, 2003. Neither Prasad (who was in India) nor Ken Technologies' president, Arun Jain, was present at the hearing.

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[2] The violation of a notice "posting" requirement, 20 C.F.R. 655.734, is not under review here, as the ALJ concluded that there was no violation and the Administrator did not request review. Additionally, the Administrator had earlier determined not to pursue prosecution of an alleged violation of 20 C.F.R. 655.730(c)(1)(vi) (failure to specify the prevailing wage for the area of employment or the source relied upon by the employer to determine the wage) (*See* D&O 2 n.1).

In an affidavit dated March 20, 2003, Jain stated that he was an employee of Ken Technologies, and was involved in the recruitment and hiring of Prasad in India (D&O 2; Respondent's Exhibit ("RX") 10, ¶ 2). The affidavit stated that during the interview process, Prasad had "falsely represented" to Ken Technologies that he had certain training which was deemed necessary by the company, and he was hired based on that representation (D&O 4; RX 10, ¶ 3).[3] According to Jain's affidavit, it was learned soon after Prasad's arrival in the United States that he did not have the training he had claimed to have, and therefore he was terminated and asked to leave the country (*Id.*; RX 10, ¶ 5). The affidavit further stated that Prasad continued to live in Ken Technologies' guest house as an "intruder" (*Id.*; RX 10, ¶ 6).

A number of e-mails were entered into evidence, including one from Prasad stating that he had completed the requisite QA training before entering this country (D&O 4; RX 1) and another, sent by a third party named "Shibu," which disputed this claim (*Id.*; RX 2).[4] The record also includes a "termination" letter

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[3] The computer-related training was called "QA" but, as the ALJ noted, no explanation was ever provided of what that entailed (D&O 4 n.4).

[4] The ALJ believed that Shibu had been an employee of Ken Technologies at the time Prasad was there (D&O 4 n.6).

addressed to Prasad, dated February 26, 2001 (D&O 5; AX 7).[5] Prasad claimed never to have received that letter and he remained in Ken Technologies' guest house (D&O 5). The ALJ also set forth the substance of several e-mail exchanges between Prasad and Jain (entered into evidence by Ken Technologies) concerning Prasad's problems securing work with other employers, his unwillingness to leave the guest house, and Jain's intimations that Prasad should vacate the premises (*Id.*). The ALJ, noting that there was no "direct evidence" on this point, stated that Prasad's e-mail of July 5, 2001 (12 days before his return to India) "implies" that he had become aware of his termination (D&O 6; RX 4). That e-mail stated, in full, "How can you terminate without intimation. Why you didn't tell me. Without my [engineering] degree certificate [which Prasad had previously requested of Jain that it be returned] I don't leave this guesthouse" (*Id.*).

Also on July 5, 2001, Prasad filed his complaint with the Department of Labor (D&O 6; AX 4). In a July 3 statement to Wage and Hour, Prasad claimed that he had not received any notification of his termination, that he had been paid only $350

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[5] Although the ALJ, in addition to referring to the Administrator's exhibit 7 (an unsigned termination letter dated February 26, 2001), also cites Respondent's exhibit 11 (a signed version of that letter), the latter exhibit was never introduced into the record (Hearing Transcript ("Tr.") 7).

since entering the country (not directly related to wages for work or lack thereof), and that Ken Technologies was holding his engineering certificate which he needed in order to return to India (D&O 6; AX 5; RX 5). Once he received this certificate, Prasad returned to India on July 17, 2001 (D&O 6; AX 6, 8).

Wage and Hour investigator John Warner testified about his investigative findings[6] and explained the H-1B regulatory requirement of payment for idle (i.e., nonproductive) periods, because H-1B workers are "not supposed to be in the United States unless they're working" (D&O 7; Tr. 15-16). Warner also testified that Ken Technologies had admitted its failure to notify the INS that Prasad was terminated (D&O 7; Tr. 18; AX 9). As support for this, Warner cited a company list of several H-1B employees of Ken Technologies and the personnel actions taken regarding each (AX 9). Under the name of Prasad, the date of termination was marked as February 26, 2001, and "copy of termination notice to INS" was marked "N.A." (not applicable) (D&O 7; AX 9). The investigator further explained the pro rata basis for his back wage calculations -- $15,233.81 covering the

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[6] A former Wage and Hour compliance specialist, Bruce A. Waltuck, who had been assigned to investigate this case prior to his retirement, had interviewed another H-1B nonimmigrant, Girish Kalra, who was familiar with Prasad's situation (D&O 6). Kalra told Waltuck that Prasad complained about not being paid by Ken Technologies during his stay in the United States (D&O 6; AX 10, 11).

period of March 18, 2001 (30 days after Prasad entered into this country, *see* 20 C.F.R. 655.731(c)(6)(ii)), to July 16, 2001 (the day before Prasad left the country) (D&O 7).

After the ALJ, by decision dated July 18, 2003, ordered payment of back wages in the amount of $15,233.81, Ken Technologies timely sought review by the Board on August 15, 2003.

B. ALJ's Decision And Order

In determining that Ken Technologies owes $15,233.81 in unpaid wages to Prasad, the ALJ cited to the regulation concerning "benching" (i.e., a period of time after an H-1B worker enters into employment with an employer during which he is in a nonproductive status due to a decision by the employer) at 20 C.F.R. 655.731(c)(7)(i) (D&O 9). The ALJ further cited to the regulatory provision at 20 C.F.R. 655.731(c)(7)(ii), which provides that payment is not required "if there has been a *bona fide* termination of the employment relationship" (D&O 9). She stated that the regulations require that the employer notify the INS that the employment relationship has been terminated so that the petition applicable to that individual may be canceled (D&O 9). *See* 20 C.F.R. 655.731(c)(7)(ii); 8 C.F.R. 214.2(h)(11).

The ALJ concluded that Ken Technologies had not effected a bona fide termination of Prasad's employment on February 26, 2001, the date that Ken Technologies stated it provided a

termination letter to Prasad, that would relieve it of the obligation to pay Prasad from March 18 to July 16, 2001, the period of his nonproductive status as an H-1B worker (D&O 9). Specifically, the ALJ stated that there was no bona fide termination because the INS was not notified of the termination by the employer (*Id.*). The ALJ also noted in this regard that Prasad remained in Ken Technologies' guest house between February 18, 2001 and July 17, 2001, when he returned to India (*Id.*). The ALJ stated that, although no bona fide termination was ever effected in strict conformance with 20 C.F.R. 655.731(c)(7)(ii), Prasad was effectively terminated by Ken Technologies (and thus was no longer in its employ) because, having returned to India, he was no longer in a position to be employed (D&O 9 n.9).

As to Ken Technologies' argument that it would be unfair to require payment to Prasad because he deliberately misrepresented his qualifications, the ALJ determined that the evidence did not establish that Ken Technologies relied upon Prasad's assertions regarding his training before the company employed him (D&O 9). Rather, the ALJ concluded that Prasad's hiring was based on a January 22, 2000 employment contract (AX 10), and that, according to a February 10, 2001 e-mail, Jain had arranged for Prasad to travel to the United States before confirming that the training was, in fact, completed (D&O 9-10; RX 1). When Ken

Technologies discovered that Prasad had not completed the QA training, it e-mailed Jain (through Shibu) to remind him of the importance of ensuring that future hires would have such training before they arrived in this country (D&O 10; RX 2). The ALJ, citing 20 C.F.R. 731(c)(7)(ii); 8 C.F.R. 214.2(h)(11); 8 C.F.R. 214.2(h)(4)(iii)(E) (applicable to payment for return transportation), concluded that even if Prasad had deliberately misrepresented his qualifications, Ken Technologies was obligated to pay for the nonproductive time because it failed to notify the INS of any termination of Prasad, who was in the country pursuant to an LCA filed with the Department of Labor (D&O 10).

The ALJ also rejected the argument that misrepresentations by an H-1B worker would make the alien an "illegal nonimmigrant worker" (D&O 10). The ALJ distinguished Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002), upon which Ken Technologies had relied, because in that case the Supreme Court held that the National Labor Relations Board could not award back pay to an undocumented alien who had never been legally authorized to work in the United States, whereas in this case Prasad was legally admitted into the country pursuant to an LCA certified by the Department of Labor (D&O 10).[7]

[7] The ALJ also addressed Ken Technologies' "constitutional" argument that the requirement to pay for "bench" time imposes an

The ALJ thus awarded back pay of $15,233.81 to Prasad for the period between March 18[8] and July 16, 2001 (D&O 11, 12).

ARGUMENT

THE ALJ CORRECTLY DETERMINED THAT KEN TECHNOLOGIES IS RESPONSIBLE FOR PAYMENT OF BACK WAGES TO PRASAD FOR THE PERIOD BETWEEN MARCH 18 AND JULY 16, 2001, DESPITE THE FACT THAT PRASAD WAS IN A NONPRODUCTIVE STATUS DURING THIS PERIOD, BECAUSE THERE WAS NO BONA FIDE TERMINATION OF PRASAD UNTIL HE RETURNED TO INDIA ON JULY 17, 2001

A. Standard Of Review

The Board reviews the ALJ's findings of fact and legal conclusions de novo. *See* Administrator v. Alden Mgmt. Serv., Inc., ARB Case Nos. 00-020; 00-021 (Aug. 30, 2002); United States Dep't of Labor v. Beverly Enterprises, Inc., ARB Case No. 99-050 (July 31, 2002). *See also* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except it may limit the issues on notice or by rule.").

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unfair burden on employers of H-1B nonimmigrants because employers who do not hire H-1B workers are not required to pay for such time (D&O 10). Although the ALJ stated that Ken Technologies "has totally failed to meet the requisite burden" in this matter, she concluded that she lacked the authority to rule on constitutional questions, citing 20 C.F.R. 655.840 (D&O 10).

[8] As alluded to above, the regulations provide that, where an H-1B nonimmigrant has not yet entered into employment, the employer must begin to pay the required wage 30 days after the nonimmigrant is first admitted into the United States. *See* 20 C.F.R. 655.731(c)(6)(ii). Prasad entered the country on February 18, 2001 (Tr. 21).

B. Statutory And Regulatory Framework

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 INS 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 temper any economic incentive or advantage in hiring temporary foreign workers. *See, e.g.*, H.R. Rep. No. 106-692, 106th Cong., 2d Sess. (2000); 2000 WL 825659, at *12 (discussion of the Department's 1996 Office of Inspector General report). Under the INA, as amended,[9] an employer seeking to hire an alien in a specialty occupation,[10] or as a fashion model of distinguished merit and ability, must seek and get permission from the Department of Labor, by submitting

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[9] 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 Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733; the American Competitiveness and Workforce Improvement Act of 1998, Pub. L. 105-277, 112 Stat. 2681 *et seq.*; and the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. 106-313, 114 Stat. 1251.

[10] 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).

an LCA, before the alien may obtain an H-1B visa from the State Department. *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, and
>
> (ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

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

The Department of Labor is required to certify the LCA within seven days unless it is incomplete or contains "obvious inaccuracies." 8 U.S.C. 1182(n)(1). Only after the employer receives the Labor Department's certification, may the INS approve an 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 the Department of Labor 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). The Department of Labor has promulgated regulations which provide detailed guidance regarding the determination, payment, and documentation of the required wages. *See* 20 C.F.R. 655.700 *et seq.* The remedies for violations of the statute or regulations include payment of back wages to H-1B workers who were underpaid. *See* 8 U.S.C. 1182(n)(2)(D); 20 C.F.R. 655.810.

Under these regulations, an H-1B worker must receive the required pay beginning on the date that the nonimmigrant "'enters into employment' with the employer," or 30 days after the nonimmigrant is admitted into the country (or 60 days after he becomes eligible to work if he is already in the country when the petition is approved). 20 C.F.R. 655.731(c)(6). The nonimmigrant is considered to have "enter[ed] into employment" when he first "makes himself available for work or otherwise

comes under the control of the employer, . . . and includes all activities thereafter." 20 C.F.R. 655.731(c)(6)(i).

Once an H-1B nonimmigrant enters into employment, periods of nonproductive activity, or "benching," must be compensated at a rate no less than the prevailing wage. *See* 20 C.F.R. 655.731(c)(7)(i). This regulation requires payment to an H-1B worker in circumstances where the "H-1B is not performing work and is in a nonproductive status due to a decision by the employer (*e.g.*, because of lack of assigned work) . . . ." *Id.*; *see* 8 U.S.C. 1182(n)(2)(C)(vii)(I).

Where there has been a bona fide termination of the H-1B worker's employment, however, the employer's obligation to continue paying wages to that individual ceases. The applicable regulation provides in pertinent part:

> Payment [of the required wage] need not be made if there has been a *bona fide* termination of the employment relationship. INS regulations require the employer to notify the INS that the employment relationship has been terminated so that the petition is canceled (8 C.F.R. 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 C.F.R. 214.2(h)(4)(iii)(E)).

20 C.F.R. 655.731(c)(7)(ii).

C. Ken Technologies Failed To Effect A Bona Fide Termination Of Prasad's Employment, And Therefore Must Pay Prasad The Wages Due Under The LCA.

1. The ALJ correctly determined that there was no bona fide termination prior to July 17, 2001, the day Prasad traveled

back to India, because the record showed that the INS was not notified and there were no other probative indicia of his termination. Ken Technologies argues (Ken Technologies' Brief ("Br.") at 2) that Prasad's employment was terminated on February 26, 2001 (by a letter of that date), because of Prasad's misrepresentation of his qualifications which rendered him unqualified to perform the work for which he had been hired. However, as the ALJ noted, Prasad claimed not to have received any notification of termination[11] and, significantly, he remained in residence at Ken Technologies' guest house until he left for India. None of the e-mails, which were vague, indicated that the reason Jain was urging Prasad to leave the guest house was for any reason other than that Ken Technologies was unable to provide work at the time (*see* RX 4-9; D&O 5). Prasad's e-mails about looking for work for which he would be paid contain no hint that he did not believe Ken Technologies to be his current employer (*Id.*).[12]

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[11] The ALJ stated in this regard that "[a]lthough no direct evidence has been presented on this issue, Prasad's email of July 5, 2001, implies that he became aware that he was terminated: 'How can you terminate without intimation? Why didn't you tell me? Without my degree certificate I don't leave this guest house'" (D&O 6). This lack of "direct evidence," when taken together with the failure to notify the INS and Prasad's remaining in Ken Technologies' guest house, is insufficient for a bona fide termination.

[12] As alluded to above, the e-mails also indicate that, as late as July 5, 2001, Prasad was attempting to obtain his engineering

Even in its brief to this Board, Ken Technologies has failed to cite any probative evidence demonstrating that the February 26 notification of termination was actually sent to and received by Prasad in February, or later. In addition, Ken Technologies does not dispute that it never notified the INS of the termination of Prasad's employment.

As the ALJ recognized, notification to the INS is probably the best indication that a bona fide termination has taken place, in that it evidences an employer's decision to no longer sponsor the H-1B worker. *See* 65 Fed. Reg. 80110, 80171 (Dec. 20, 2000) ("The Department would not likely consider it to be a *bona fide* termination for purposes of this provision unless INS has been notified that the employment relationship has been terminated . . . ."). The Administrator, however, does not here argue that there cannot be a bona fide termination absent notification to the INS. The regulation at 20 C.F.R. 655.731(c)(7) (quoted above) first states that "[p]ayment need not be made if there has been a *bona fide* termination of the employment relationship," and then separately states that "INS regulations require the employer to notify the INS that the employment relationship has been terminated so that the petition

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degree certificate back from Ken Technologies. This, too, seems to lend support to the absence of a bona fide termination of Prasad by Ken Technologies prior to Prasad's return to India.

is canceled (8 CFR 214.2(h)(11))." The regulation therefore does not state that a bona fide termination may occur only upon notification to the INS.[13] In fact, there may be other indicia of a bona fide termination, at which time an employer's obligation to continue to pay wages would cease.

For example, termination would be bona fide if the employee ceased working for the employer and became employed by another employer which had filed a petition on his behalf. Termination would also be bona fide where an employee has returned to his home country with no plans to come back to the job (*see, e.g.*, D&O 9 n.9).[14] Furthermore, there may be situations in which the evidence is clear that an employer has officially notified an employee of his termination, and there is no dispute that such notice was received; in such cases, the Administrator takes the position that the notice may constitute a bona fide termination ending the obligation on the part of the employer to pay wages to the H-1B worker. Nevertheless, in any of these situations,

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[13] Similarly, the preamble to the H-1B interim final rule, while recognizing the importance of notifying the INS, does not explicitly make a bona fide termination, and the consequent relief from the obligation to pay wages, dependent on such notification. *See* 65 Fed. Reg. 80110, 80170-71 (Dec. 20, 2000).

[14] By stating that there was a bona fide termination of Prasad when he returned to India, the ALJ effectively stated that notification to the INS (which did not occur here) is not a prerequisite for a bona fide termination of employment.

notification to the INS should promptly follow the action of termination, as the INS regulations provide.

In the present case, however, there was neither notification to the INS nor, prior to Prasad's return to India on July 17, 2001, any persuasive, clear-cut evidence that a bona fide termination had taken place. Thus, as the ALJ determined, because Prasad was employed in a nonproductive status and was not terminated in a bona fide manner in accordance with the regulation at 20 C.F.R. 655.731(c)(7)(ii), he was entitled to receive pay for the period between March 18 and July 16, 2001.

2. Ken Technologies argues that none of its actions defeated the "intent" behind the requirement of paying H-1B employees for nonproductive periods -- to protect domestic workers by preventing the "stockpiling" of H-1B workers (Br. at 3-4). A rationale behind the requirement to pay for nonproductive time is reflected in the Preamble to the H-1B Interim Final Rule, where the Labor Department observed that

> an H-1B nonimmigrant is not permitted to be employed by another employer while "benched" (unless another employer files a petition on behalf of the worker or the worker adjusts his or her status under the INA), and is without any legal means of support in the country. In contrast, a U.S. worker can seek other employment and would be eligible for Federal programs such as food stamps.

65 Fed. Reg. 80110, 80170 (Dec. 20, 2000).[15] The significant point, however, is that Ken Technologies failed to comply with the plain language of the statute and regulations, to which it had voluntarily agreed as part of participating in the H-1B program, to pay its H-1B worker for nonproductive time. *See* 8 U.S.C. 1182(n)(2)(C)(vii)(I); 20 C.F.R. 655.731(c)(7)(i).

3. Ken Technologies further claims that Prasad's own actions in misrepresenting his qualifications rendered him "unable" to work, and that, therefore, an exception to the requirement of paying for "bench" time is applicable here (Br. at 5-6). This argument is without merit. It was entirely Ken Technologies' decision to decline to assign work to Prasad, thereby placing him in "nonproductive status" and requiring the payment of wages. *See* 20 C.F.R. 655.731(c)(7)(i).

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[15] This explanation also refutes Ken Technologies' "due process" argument (Br. at 14) -- that requiring H-1B employers to pay for nonproductive time discriminates against them because employers of non-H-1B workers are not required to pay under such circumstances. As stated above, United States workers have other avenues for legally generating income, while H-1B workers do not. Moreover, because Ken Technologies voluntarily subjected itself to the requirements of the H-1B program by submitting an LCA, it cannot now contest the fairness of the program itself. *See* United States Dep't of Labor v. Dallas VA Medical Ctr., ARB Case Nos. 01-077; 01-181 (Oct. 30, 2003). Any complaints about unfairness in the H-1B provisions should properly be addressed to Congress. In any event, the Board generally does not rule on the constitutionality of the relevant statute or implementing regulations. *See* Jones v. EG&G Defense Materials, Inc., ARB Case No. 97-129 (Sept. 29, 1998).

The regulation makes clear the kinds of conditions that place an H-1B employee in a nonproductive status for reasons that are not the responsibility of the employer, and thus do not require payment -- voluntary vacations, medical incapacity, caring for a sick relative, and the like. *See* 20 C.F.R. 655.731(c)(7)(ii). Employees, however, who are legally authorized to work, and who make themselves available for work or otherwise come under the control of the employer, are improperly "benched" if the employer fails to pay the required wages for nonproductive time resulting from its decision (e.g., a lack of assigned work), or a lack of a permit or license. *See* 20 C.F.R. 655.731(c)(6)(i) and (c)(7)(i). That Prasad's qualifications might not be what Ken Technologies sought does not relieve Ken Technologies of its obligations regarding the payment of wages for nonproductive time under the statute and regulations.

4. Ken Technologies also mistakenly relies on Hoffman Plastic, *supra*, to argue that Prasad was in this country illegally and therefore is not entitled to back wages (Br. at 7-10).[16] Hoffman Plastic, however, is inapplicable to this case.

[16] In Hoffman Plastic, which involved the Immigration Reform and Control Act of 1986, the Supreme Court held that the National Labor Relations Board could not award back pay to an undocumented worker who was in this country illegally, and thus was not authorized to work in the United States, and who was

Contrary to Ken Technologies' argument, Prasad was legally authorized to work in this country under an H-1B visa issued by the INS (pursuant to DOL's approval of the LCA). The Supreme Court in Hoffman Plastic was concerned with, among other things, the award of back pay to an illegal alien "for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud." 535 U.S. at 148-49. This simply does not obtain in the present case. Ken Technologies' recourse for any misrepresentation by Prasad in regard to his qualifications was to terminate him in a bona fide manner, something it failed to do. Given the record evidence that the INS was never notified of Prasad's termination, that the February 26, 2001 letter was not a bona fide termination because there was no proof that Prasad had received it, and that Prasad continued to live in Ken Technologies' guest house, Ken Technologies' obligation to pay wages to Prasad until he returned to India was manifest. Nothing in Hoffman Plastic is to the contrary.

5. Finally, Ken Technologies objects to the Administrator's refusal to agree that its principal, Jain, could testify by telephone from India (Br. at 11-13). It claims that had such testimony been permitted, Jain could have testified and

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discharged in violation of the National Labor Relations Act. 535 U.S. at 1284-85.

been cross-examined regarding his conversations with Prasad regarding Prasad's pre-employment training. First, Ken Technologies never filed a motion with the ALJ seeking to have Jain testify by telephone; thus there was no request before the ALJ that would have given rise to the issuance of a Show Cause Order. Second, as argued above, Prasad's pre-employment training is beside the point here. Rather, the relevant issue is whether there was a bona fide termination of Prasad's employment, thereby enabling Ken Technologies to escape responsibility for the payment of his wages while he was in a nonproductive status.[17] Third, the affidavit submitted by Jain was accepted into evidence by the ALJ and relied upon as appropriate. Jain was not barred from submitting as detailed an affidavit as was relevant.

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[17] There are, however, salient reasons for the Administrator's refusal to countenance such an arrangement. When parties are not confronting each other face-to-face, the ALJ cannot fairly assess witness credibility. Moreover, the Administrator had no authority to secure the presence of Prasad (either in person or by telephone) to be questioned and cross-examined once he returned to India. Without Prasad's having the opportunity to comment on Jain's telephonic testimony, a degree of unfairness would be present.

CONCLUSION

For the reasons stated, the Board should affirm the Decision and Order of the ALJ and deny Ken Technologies' Petition for Review in this case.

Respectfully submitted,

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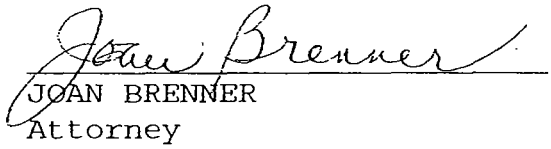

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CERTIFICATE OF SERVICE

This is to certify that on this 10th day of December, 2003, copies of the foregoing Statement of the Wage and Hour Administrator were sent to:

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