U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 December 2003

CASE NO.: 2003 LCA 17
In the Matter of

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR
Prosecuting Party

v.

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

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Appearances:
Ms. Maria L. Spitz, Attorney
Mr. Alfred Fisher, Attorney
For the Administrator

Mr. H. Ronald Klasko, Attorney
For the Respondent

Before:
Richard T. Stansell-Gamm
Administrative Law Judge

INITIAL DECISION AND ORDER

This case arises under Section 1182 (n) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182 (n), as amended ("INA"), and the implementing regulations, 20 C.F.R. Part 655, Subpart H. In November 2003, both parties submitted Motions for Summary Decision/Judgment and response briefs. Since the joint stipulation of facts indicates no factual dispute exists between the parties, I have essentially adjudicated this case as a decision on the record, based on the stipulated facts.

Background

On March 20, 2003, the District Director, on behalf of the Administrator, notified Mr. Suresh K. Kakkirala, President of Cyberworld Enterprise Technologies, d/b/a Tekstrom, Inc. ("Tekstrom"), that an investigation had disclosed a violation of 20 C.F.R. § 655.738. According to the Administrator, in violation of one of the Labor Certification Application ("LCA") conditions, Tekstrom had failed to make the required displacement inquiry of a secondary employer. Due to the violation, the Administrator sought to impose a civil money penalty of

$3,400 and directed Tekstrom to comply with 20 C.F.R. § 655.738 in the future. Additionally, under the provisions of 20 C.F.R. § 655.855 (a), the Administrator also intended to inform both the U.S. Department of Labor ("DOL"), Employment and Training Administration ("ETA") and the Attorney General ("AG") of the violation. Upon such notification, the AG is required to deny any additional petition related to an LCA for at least one year. In turn, ETA is required to invalidate any current LCAs (in regards to future hires) and not accept any new LCAs from Tekstrom for the period established by the AG.

In response, on April 2, 2003, Tekstrom requested a hearing with the Office of Administrative Law Judges ("OALJ") "for the simple reason that one year debarment penalty imposed on Tekstrom is out of proportion."

Pursuant to a Revised Notice of Hearing, dated July 16, 2003, I set a hearing date for this case of October 7, 2003 in Wilmington, Delaware. Subsequently, after issuing a decision on pre-hearing motions[1] and a conference call with the parties, I continued the hearing pending resolution of their respective motions for summary decision/judgment.

Applicable Regulations

20 C.F.R. Part 655. In general, 20 C.F.R. Part 655 sets out the procedures adopted by the Secretary, U.S. Department of Labor, for employers who seek nonimmigrant aliens for temporary work within the United States. As part of that process, DOL obtains information to determine whether employment of nonimmigrant workers for temporary work will adversely affect the working conditions of similarly employed U.S. workers. 20 C.F.R. § 655.0 (a). Subpart H establishes the process an employer must follow to file for, and obtain, approval from DOL for an LCA which then may be used to petition the Immigration and Naturalization Service ("INS") for a H-1B visa under the INA to enable temporary employment of foreign workers in certain specialty occupations. 20 C.F.R. § 655.0 (d).

20 C.F.R. § 655.736. According to 20 C.F.R. § 655.736 (g) (1), an H-1B dependent employer[2] is subject to the additional attestation obligations regarding the displacement of U.S. workers for all LCAs it submits to support petitions for H-1B visas.

20 C.F.R. § 655.737. An H-1B dependent employer is not required to make additional LCA attestations concerning the displacement of U.S. workers if the LCA involves a nonimmigrant worker who satisfies the criteria for "exempt" status. 20 C.F.R. § 655.737 (a). A nonimmigrant worker qualifies for exempt status if the worker receives wages at an annual rate equal to, or greater than, $60,000 or the worker has a masters or higher degree. 20 C.F.R. §655.737 (b). If an employer does not designate the exempt status of the nonimmigrant worker

[1]I denied the Respondent's motion to dismiss the case due to the Administrator's failure to comply with statute's provision to render a determination within 30 days of a complaint, 8 U.S.C. § 1182 (n) (2) (B).

[2]The designation of H-1B dependent employer is based on total number of employees and the percentage of employed H-1B employees. 8 U.S.C. 1182 (n) (3). For example, an employer with 26 to 50 employees is an H-1B dependent employer if more than 12 H-1B employees are in its workforce.

on the LCA, then it has waived the option of not being subject to the additional LCA attestation obligations. 20 C.F.R. § 655.737 (e) (3).

20 C.F.R.§ 655.738. As one means to protect U.S. workers, 20 C.F.R. § 655.738 prohibits an H-1B dependent employer from either directly (in its own workforce) or secondarily (in the workforce of a secondary employer) displacing any U.S. worker. To ensure compliance in regards to secondary displacement, prior to placing a nonimmigrant worker, the H-1B dependent employer must make certain inquiries of, and/or obtain information from a prospective secondary employer of the nonimmigrant worker concerning whether the secondary employer has displaced, or intends to displace, similarly employed U.S. workers. 20 C.F.R. § 655.738 (d). Specifically, the H-1B dependent employer can not place a nonimmigrant worker with a secondary employer without asking the secondary employer whether within 90 days of the placement of the nonimmigrant worker, the secondary employer has displaced or intends to displace a similarly employed U.S. worker. 20 C.F.R. § 655.738 (d) (5).

Not every placement of a nonimmigrant worker with another employer will trigger the secondary displacement prohibition. The prohibition applies when the placement of the nonimmigrant worker occurs at worksite owned by the other/secondary employer and the relationship between the nonimmigrant worker and the other/secondary employer carries indicia of a typical employer-employee relationship. 20 C.F.R. § 655.738 (d) (2). Notably, even if the H-1B dependent employer makes the required inquiry of the secondary employer, the "employer shall be subject to a finding of a violation of the secondary displacement prohibition if the secondary employer, in fact, displaces any U.S. worker(s). . ." *Id*.

The employer must exercise due diligence in making the secondary employer inquiries. Reasonable efforts of compliance include: written assurance; memorandum of an oral assurance; or, inclusion of a provision in a contract in which the secondary employer agrees that it has not, and will not, displace any U.S. worker in a similar job. 20 C.F.R. §§ 655.738 (d) (5) (i) (A) to (C). If the H-1B dependent employer has information that some U.S. workers have been displaced, then the employer must exercise more than due diligence by making a particularized inquiry. 20 C.F.R. § 655.738 (d) (5) (ii). Finally, the H-1B dependent employer must document the means it utilized to satisfy its obligation concerning displacement of U.S. workers by secondary employers. 20 C.F.R. § 655.738 (e) (2).

20 C.F.R. § 655.805. To further ensure compliance, the regulations require investigation by the Administrator to determine whether an H-1B dependent employer has displaced a U.S. worker employed by a secondary employer where the nonimmigrant worker was placed in violation of 20 C.F.R. § 655.738. 20 C.F.R. § 655.805 (a) (7). The Administrator must also investigate to determine whether an H-1B dependent employer failed to make the required Section 738 displacement inquiry of another employer where the nonimmigrant employee was placed. 20 C.F.R. § 655.805 (a) (8). Additionally, the Administrator must evaluate situations in which the employer displaced a U.S. worker in the process of committing a willful violation relating to the various failures of obligations set out in paragraphs (a) (2) to (a) (9) of the section, which includes (a) (7) and (a) (8) discussed above.[3]

[3]The Administrator may conduct such investigations based on complaints, other information, or random of selection of certain employers. *See* 20 C.F.R. §§ 655.806 to 808.

Upon completion of an investigation, the Administrator must issue a determination and specifically state whether a violation was "substantial" or "willful." 20 C.F.R. § 655.805 (b). Some penalties and disqualification for a few violations set out in subparagraphs (a) (5) (failure to provide notice of LCA filing), (a) (6) (failure to provide the requisite specifics on the LCA), or (a) (9) (failure to recruit in good faith) may be imposed only if the violations are either substantial or willful. In a similar manner, penalties and disqualification are only permitted for "willful" violations of (a) (2) (failure to pay required wages) and (a) (3) (failure to provide requisite working conditions). *Id*.

20 C.F.R. § 655.810. If violations have occurred, the regulation authorizes three specific sets of civil monetary penalties and three degrees of employer disqualification for additional LCA petitions. First, under 20 C.F.R. § 655.810 (b) (1), the Administrator may assess civil money penalties not to exceed $1,000 for: (i) a violation pertaining to "strike/lockout (§ 655.733) or displacement of U.S. workers (§ 655.738)"; (ii) a "substantial" violation relating to notification, LCA specifics, or recruitment; and, (iii) a misrepresentation of a material fact in an LCA. According to 20 C.F.R. § 655.810 (d) (1), for a violation of any of the provisions set out in (b) (i) to (iii) above, 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. . ." for at least one year.

Second, under 20 C.F.R. § 655.810 (b) (2), the civil monetary penalties may not exceed $5,000 for a violation relating to: (i) a willful failure pertaining to wages/conditions of employment, strike/lockout, notification, LCA specifics, recruitment and worker displacement (including secondary displacement); (ii) willful misrepresentation of a material fact; and (iii) unlawful employee discrimination. The associated disqualification period is at least two years. 20 C.F.R. § 655.810 (d) (2).

Third, under 20 C.F.R. § 655.810 (b) (3), the Administrator may impose a civil money penalty not greater than $35,000 when an employer displaced a U.S. worker in conjunction with a willful violation of any provision of § 655.805 (a) (2) to (9). The corresponding disqualification of the employer continues for at least three years. 20 C.F.R. § 655.810 (d) (3).

The Administrator may also impose other administrative remedies, including reinstatement and back wages for violations of the provisions in (b) (1) (i) to (iii), (b) (2), and (b) (3). 20 C.F.R. § 655.810 (e) (2).

In setting the amount of the civil money penalty, the Administrator must consider: the employer's previous compliance history, the number of workers affected, gravity of the violation, good faith efforts by the employer, employer's explanation, employer's commitment to future compliance, and any financial gain received by the employer. 20 C.F.R. § 655.810 (c).

In addition to a civil money penalty, the Administrator "shall notify the Attorney General pursuant to § 655.855" that an employer is disqualified from receiving LCA approvals for a set period of time ranging from one year to three years depending on the nature of the violation and willfulness of the employer's violation. 20 C.F.R. § 655.810 (d).

20 C.F.R. § 655.855. Upon final determination of the violations, the Administrator shall notify the Attorney General and ETA of the associated employer disqualification periods set out in 655.810 (d). 20 C.F.R. § 655.810 (a). Upon notification, and for the specified period, the Attorney General shall not approve any additional petitions filed by the employer for the employment of nonimmigrant workers. 20 C.F.R. § 655.810 (c). Upon receipt of the Administrator's notice, the ETA shall invalidate any Subpart H LCAs and not accept any new applications for the specified period. 20 C.F.R. § 655.855 (d).

Parties' Positions

A. Motions for Summary Decision/Judgment

Respondent

For multiple, and at times alternative reasons, a summary decision in favor of Tekstrom should be granted and the case dismissed.

First, according to the "plain language" of the regulations, the cited violation by Tekstrom is not identified as a violation requiring disqualification for one year. The provisions requiring the Attorney General to preclude the approval of petitions under the INA, 20 C.F.R. §§ 655.855 (a) and (c), specifically state that the applicable offenses and duration of the disqualifications are set out in 20 C.F.R. § 655.810 (f). However, Tekstrom's cited violation, failure to make a displacement inquiry of a secondary employer, is not contained in 20 C.F.R. § 655.810 (f).

Next, and closely related, another regulatory provision, 20 C.F.R. § 655.810 (d), does associate disqualification with some violations. However, it may not be applied to Tekstrom in this case because the Administrator failed to reference that specific subparagraph in its determination letter as authority for a one year disqualification. Due to the absence of that specific citation, Tekstrom had insufficient notice of the Administrator's authority to impose the disqualification upon which to base a response. As a result, the Administrator may not impose the disqualification remedy.

Third, and in the alternative, if 20 C.F.R. § 655.810 (d) is to be considered applicable in Tekstrom's situation, its language still does not require a one year disqualification for Tekstrom's failure to make a displacement inquiry. In establishing the disqualification remedy, Section 810 (d) (1) references violations set out in 20 C.F.R. § 655.810 (b) (1) (i). The only violation relating to displacement in 20 C.F.R. § 655.810 (b) (1) (i) is the "displacement of U.S. workers," a violation different than Tekstrom's failure to make secondary displacement inquiries. The distinction is significant because 20 C.F.R. § 655.805 lists the two actions as separate violations under (a) (7) (displacement of U.S. workers) and (a) (8) (failure to make a displacement inquiry). Consequently, since 20 C.F.R. § 655.810 (b) (1) (i) does not include Tekstrom's violation of failing to make a displacement inquiry, the one year disqualification sanction set out in 20 C.F.R. § 655.810 (d) is inapplicable.

Fourth, while 20 C.F.R. § 655.810 (d) states the Administrator "shall" notify the Attorney General of the one year disqualification, that term should be interpreted as discretionary, rather than mandatory. In an earlier pre-hearing dispute, counsel for the Administrator argued that the term "shall" (as it related to completion of a complaint determination within 30 days) was discretionary and prevailed on the motion.[4] Consistent with that holding, the term "shall" should continue to be interpreted as discretionary. Additionally, numerous courts have indicated that the term "shall" in administrative enforcement proceedings should be viewed as discretionary.

If disqualification is discretionary under 20 C.F.R. § 655.810 (d), then imposition of the one year disqualification would be an abuse of discretion. In Tekstrom's case, no U.S. worker was actually displaced. The nearly year and a half long investigation disclosed no other violations of the regulation or law. Significantly, the one year disqualification would be the "death knell" for Tekstrom.

Finally, in light of the language of the INA, Tekstrom should not be disqualified due to a failure to make a displacement inquiry when it is unaware of the company which has actually received the nonimmigrant worker. According to 8 U.S.C. § 1182 (n) (2) (E), if an H-1B dependent employer places a nonimmigrant worker with another employer and the other employer has displaced or displaces a U.S. worker, the H-1B dependent employer is in violation of an LCA condition. Yet, while civil money penalties may be imposed for this violation, the Attorney General may impose the additional disqualification sanction only if the Secretary of Labor determines that the H-1B dependent employer knew or had reason to know of such displacement.

In its business, Tekstrom usually places a nonimmigrant worker with a vendor. In turn, the vendor places the nonimmigrant worker with a third employer, who is usually unknown to Tekstrom. As a result, in the absence of the requisite knowledge of the tertiary employer, Tekstrom would not be held liable for displacement of a U.S. worker employed by the tertiary employer. In the same manner, since the tertiary employers are unknown to Tekstrom, the company cannot be held in violation of the statute and regulation for failing to make a displacement inquiry of the tertiary employers.

Prosecuting Party

Since neither a genuine issue of material fact nor a credibility issue are present in this case, a Summary Judgment in favor of the Prosecuting Party for all remaining issues should be granted. Tekstrom violated 8 U.S.C. § 1182 (n) (1) (F) and 20 C.F.R. § 655.738 by failing to make secondary displacement inquiries of employers at worksites where fourteen of Tekstrom's H-1B nonimmigrant workers were employed, even though Tekstrom was unaware of the ultimate placement of the nonimmigrant workers. Due to the violations, a civil money penalty of

[4]Both parties have changed interpretation horses at this present litigation stream. In the previous pre-hearing dispute, counsel for Tekstrom argued just as adamantly that the term "shall" was mandatory.

$3,400 is appropriate and the matter must be referred to the Attorney General for the mandatory one year disqualification.[5]

The plain language of the statute, 8 U.S.C. §§ 1182 (n) (1) (E) and (F) and 20 C.F.R. §§ 655.738 (d) (2) and (5) prohibited Tekstrom, an H-1B dependent employer, from placing certain H-1B nonimmigrant workers with other employers, in situations that had the indicia of an employment relationship, without making an inquiry of the other employers about displacement of U.S. workers. Between January 19, 2001 and October 1, 2002,[6] Tekstrom completed and submitted LCAs for fourteen nonimmigrant workers. Since it did not claim that any of the 14 workers were in "exempt" status, Tekstrom was bound by the LCA non-displacement attestation provisions.[7] Under these provisions, Tekstrom agreed to comply with "certain obligations" to avoid displacement of U.S. workers either in its own workforce or the workforce of a secondary employer with whom the H-1B nonimmigrant was placed. The completed LCAs were subsequently approved by DOL. In turn, INS issued visas for the 14 nonimmigrant workers. Through multiple contracts with numerous vendors, Tekstrom placed 13 nonimmigrant workers with vendors who then placed the workers in their clients' businesses. Tekstrom placed the remaining nonimmigrant worker with its own client business. Each of the immigrant's working conditions had the requisite indicia of an employment relationship.

At the time of the workers' placements with secondary and other employers, Tekstrom failed to make the required non-displacement inquires. Specifically, Tekstrom did not: a) inquire of its vendors and client business whether they displaced or intended to displace U.S. workers; b) seek assurances from its vendors that the vendors' client businesses would not displace U.S. workers through their placement of the nonimmigrant workers; and, c) include a non-displacement clause in its contracts with the vendors and client business. By these failures, Tekstrom willfully violated the H-1B program regulation, 20 C.F.R. § 655.738, as set out in the Summary of Violations and Remedy attached to the Administrator's determination letter.

Taking into consideration the multiple factors in mitigation and extenuation set out in 20 C.F.R. § 655.810 (c), the Administrator reasonably and properly determined a civil money penalty in the amount of $3,400. Tekstrom does not contest the amount of the civil money penalty.

Under the plain language of the statute and regulation, 8 U.S.C. § 1182 (n) (2) (C) (i) and 20 C.F.R. § 655.810 (d), the one year disqualification sanction is a mandatory penalty for a violation of the displacement provisions in 20 C.F.R. § 655.738. While the statute indicates the Secretary "may" impose other administrative remedies, the law also states the Secretary "shall" notify the Attorney General of a failure to comply with the LCA conditions. Upon such notification, the Attorney General "shall not" approve the employer's applications for one year.

[5]Neither party addressed the effectiveness of a referral to the Attorney General since INS has been transferred from the U.S. Department of Justice to the Department of Homeland Security.

[6]Joint stipulation of fact, No. 9.

[7]Although 12 of the 14 nonimmigrant workers were qualified for exempt status, Tekstrom's failure to claim exempt status on the respective LCAs waived its option not to be bound by the additional LCA attestation obligations concerning non-displacement. 20 C.F.R. § 655.737 (e) (3).

Giving the term "shall" its ordinary and natural meaning, neither the Secretary nor the Attorney General have the discretion to modify or reduce the one year disqualification. When Congress intends to provide such discretion, a statute will include specific language to that effect. For example, in the Service Contract Act, 41 U.S.C. 354 (a), the Secretary has the specified discretion not to impose a three year contract debarment in "unusual circumstances." Absent any such provision in this case, and considering the significant purpose behind the statutory and regulatory language, the protection of U.S. workers, the term "shall" imposes an mandatory obligation on the Secretary and Attorney General. In a previous case, the DOL administrative appellate body has upheld the one year disqualification due to an inaccurate notification statement in three LCAs.[8]

Tekstrom's obligation concerning displacement inquiries was not extinguished by its use of vendors who then passed the nonimmigrant workers onto other employers. The regulation, 20 C.F.R. § 655.738, through the phrase, "not limited to" and the word "other" clearly envisions that an H-1B dependent employer's inquiry obligation goes beyond its immediate clients. Tekstrom had an obligation to make a reasonable effort to determine whether the placement of its 14 nonimmigrant workers with other employers, through its vendors, would have displaced U.S. workers. Even without knowing the identity of the other employers, Tekstrom could have readily obtained non-displacement assurances from its vendors, and/or included a non-displacement clause in its contracts with the vendors. Even if the workers passed through Tekstrom's vendors are excluded, Tekstrom still violated the statute and regulation by placing one nonimmigrant worker with its own client business without making the requisite displacement inquiry.

B. Response Briefs

Respondent

The legislative history of the statute demonstrates that imposition of the one year disqualification is discretionary and not mandatory. Additionally, Congress clearly only intended sanctions to be imposed if the employer was aware of an employee displacement. In Tekstrom's case no displacement of a U.S. worker occurred. The regulations were designed to distinguish between inadvertent or good faith errors and willful violations. In this case, Tekstrom's cited violations were due to an inadvertent error.

The Administrator's insistence that the term "shall" sets out a mandatory duty is inconsistent with the Administrator's earlier position and court interpretations of the term during administrative enforcement actions. The Secretary does have discretion on the referral sanction. Since no harm was done to any U.S. worker, the Secretary should exercise that discretion and not impose the severe penalty of a one year disqualification.

In situations where actual displacement of a U.S. worker occurs, Tekstrom acknowledges an H-1B dependent employer would be liable for the violation regardless of whether it was aware of the displacement. However, in Tekstrom's case, where no displacement occurred, it's

[8] *Kolbusz-Kijine v. Technical Career Institute*, 1993 LCA 4, 1994 WL 897284, at page 8 (Sec'y July 18, 1994) and *Kolbusz-Kijine v. Technical Career Institute II*, 1994 LCA 10, 1995 WL 848103, n. 3 (Sec'y July 3, 1995).

lack of knowledge concerning the other employers is a viable defense. Congress could not have intended that in cases where no displacement occurred, an H-1B dependent employer should nevertheless be forced out of business by the one year disqualification.

Prosecuting Party

The Respondent, Tekstrom, should not be permitted to raise for the first time in its Motion of Summary Decision the defenses that a) the plain language of the regulation the Administrator cited in the Determination Letter does not require debarment; and, b) the regulatory provision that does authorize debarment can not be applied against Tekstrom because Administrator failed to cite that provision in the Determination Letter. Due to the late submission of these two defenses, Tekstrom has waived them.

Although 20 C.F.R. § 655.810 (f) cited by the Administrator in the Determination Letter does not specifically address the one year disqualification, the Determination Letter and its attachment, when read together, provide sufficient information to establish that Section 1182 (n) of the statute and all of 20 C.F.R. § 655.810 are applicable, including 20 C.F.R. § 655.810 (d), which sets out the one year disqualification sanction. Significantly, the statute itself, at 8 U.S.C. § 1182 (n) (2) (C) (i) (I), (II), associates the failure to make required secondary displacement inquiries with the debarment sanctions. Further, as readily apparent in Tekstrom's responses, the company is well aware that the one year disqualification is being brought under authority of 20 C.F.R. § 655.810 (d) and the statute.

While 20 C.F.R. § 655.810 (d) was not actually cited in the Determination Letter, the Administrator did specifically state the alleged violation fell under 8 U.S.C. § 1182 (n) and 20 C.F.R. § 655.738 and that the intended remedies were both a civil money penalty and notification to the Attorney General for a one year debarment action. In light of that language, Tekstrom was clearly placed on notice of both the alleged violation and intended consequences. Notably, Tekstrom has failed to establish any prejudice due to the absence of a specific citation to 20 C.F.R. § 655.810 (d) in the determination letter.

When its sections are read together, Part 655 establishes that the phrase "displacement of U.S. workers" refers to both actual displacement and displacement inquiries. The congressionally mandated sanction for a violation concerning displacement of U.S. workers is the debarment referral to the Attorney General. Although some courts have carved out a few exceptions to the mandatory meaning of "shall" in agency enforcement actions, other tribunals have determined that agency discretion lies in bringing an enforcement action rather than the application of the sanction if a violation is established. Since the Administrator is an agency representative, his reasonable interpretation that the congressional use of the term "shall" imposes an mandatory obligation is entitled to deference.

Finally, the facts in this case clearly establish that in regards to its own client business, Tekstrom failed to make the requisite displacement inquiry. Although remaining violations relate to placement of H-1B nonimmigrant workers with vendors' client businesses, compliance with the regulatory inquiry requirements in regards to those other placements was neither impossible nor impracticable. As an H-1B dependent employer seeking approval of its LCAs,

Tekstrom accepted the applicable LCA conditions, including the duty to make displacement inquiries. The regulation provides several methods for meeting that obligation, including the use of contractual non-displacement clauses. However, Tekstrom chose no action at all.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations of Fact

As part of their respective motions, the parties have agreed to the following relevant stipulations of fact. Cyber World Enterprise Technologies, Inc., d/b/a Tekstrom, is an H-1B dependent employer as defined by 20 C.F.R. § 655.736, engaged in computer software development and consulting (4 and 9).[9] The company also provides computer maintenance service and recruits and employs skilled computer professionals (5 and 6).

Between January 19, 2001 and October 1, 2002, Tekstrom's president, Mr. Suresh Kakkirala, submitted 14 LCAs (exhibits A-1 to A-14), which where approved by DOL (14 to 17).[10]

On each LCA, Mr. Kakkirala declared Tekstrom was an H-1B dependent employer (19). He did not select the option on any of the submitted LCAs that indicates the LCA will be used to support a petition for an exempt nonimmigrant (20). On each LCA, Tekstrom agreed to comply with both the primary attestations (relating to wages, working conditions, strike/lockouts, and notice to union and workers) and, due to its status as an H-1B dependent employer, the additional labor conditions statements, which included nondisplacement of U.S. workers in another employer's work force (21).

Between January 19, 2001 and October 1, 2002, through numerous contracts, Tekstrom placed the fourteen H-1B nonimmigrant workers with various vendors (23 and 24 and exhibits C-1 to C-19). The vendors in turn placed the H-1B nonimmigrant workers with their respective client businesses at the clients' worksites where the H-1B nonimmigrant workers performed work for the client businesses (22 and 25). From August 6, 2001 to March 9, 2002, Tekstrom also placed one H-1B nonimmigrant worker with its own client business (27 and 28). At each of the worksites, the H-1B nonimmigrant worker's working conditions had the indicia of an employment relationship with the client business, including the client business' rights: to discharge the H-1B nonimmigrant worker, assign work, and control the manner, method, and duration of work (26, 29, 30, and 31). Additionally, at each worksite, the H-1B nonimmigrant worker used the client business' equipment and supplies (32).

During the placement of each H-1B nonimmigrant worker with a vendor or its own client business, Tekstrom did not inquire whether such vendor or client business displaced or intended to displace any similarly employed U.S. worker within 90 days of the H-1B nonimmigrant's placement (33, 34, and 35). Similarly, Tekstrom did not obtain any assurances from its business client and vendors that the H-1B nonimmigrant's placement would not displace similarly

[9]Numbered joint stipulations of fact

[10]Usually DOL approved the LCAs after 5 to 11 days of receipt (*see* A-1 to A-14).

employed U.S. workers within 90 days of the placement (39). Additionally, Tekstrom did not inquire of any of the vendors through which the H-1B nonimmigrant workers had been placed whether the vendor sought assurances from its client businesses who received H-1B nonimmigrant workers that such placement would not displace any U.S. worker within 90 days (36). None of Tekstrom's contracts with its client business and vendors contained clauses which required: a) the client business or vendor not to displace any U.S. worker within 90 days of the H-1B nonimmigrant worker's placement; or, b) the vendor to seek assurances from other businesses with which the H-1B nonimmigrant workers were placed that such businesses would not displace any U.S. worker within 90 days of placement (37 and 38).

Of the fourteen H-1B nonimmigrant workers, only two individuals received an annual salary less than $60,000 and did not have advanced education degrees (43 and 44). As a result, these two individuals did not qualify for "exempt" status within the meaning of 20 C.F.R. § 655.737 (45). At the worksites where these two individuals were placed, no U.S. worker was displaced within 90 days of their placement (46 and 47).

Based on the receipt of a complaint, the Administrator conducted an investigation of Tekstrom's compliance between January 19, 2001 and October 1, 2002 (7, 8, and 9). Tekstrom cooperated with the investigation (33, 34, and 40). Other than Tekstrom's failure to make the required secondary displacement inquiries, the full-scoped investigation revealed no other violations (48).

Finally, Tekstrom and the Administrator agree that the civil money penalty of $3,400 is appropriate for the alleged violation (41).

Preliminary Finding and Defense Issues

The principal issue that led to this dispute involves the purported mandatory imposition of a one year debarment of Tekstrom for its LCA violations. Prior to addressing that concern, I first must discuss the existence of a violation and then consider the additional issues Tekstrom raised as defenses against imposition of the debarment sanction.

A. Violation

Based on the stipulations of findings, I conclude that between January 19, 2001 and October 1, 2002, as an H-1B dependent employer, Tekstrom committed fourteen violations of 8 U.S.C. § 1182 (n) (1) (F). On each respective LCA supporting the visa for an H-1B nonimmigrant worker, Tekstrom agreed to comply with the additional LCA conditions which included the requirement in 8 U.S.C.§ 1182 (n) (1) (F) to make an inquiry of another employer prior to placement of an H-1B nonimmigrant worker with that other employer, whether the other employer had displaced, or intended to displace, a U.S. worker similarly employed by the other employer within 90 days of the nonimmigrant worker's placement. Between January 19, 2001 and July 2002, Tekstrom violated its LCA secondary displacement condition by failing to make any inquiry of, or seek assurances from, the other employers, including both its own client business and vendors, who received and placed its H-1B nonimmigrant workers. Likewise,

Tekstrom failed to include contractual provisions in its fourteen contracts related to the non-displacement of U.S. workers.

In light of these violations, under 8 U.S.C. § 1182 (n) (2) (C) (i) (I), a civil money penalty of $3,400 against Tekstrom is appropriate. In accordance with procedures in 20 C.F.R. §655.810 (f), the civil money penalty is due immediately upon the decision of the administrative law judge unless the Secretary grants review of the decision.

B. Absence of Reference in 20 C.F.R. § 655.810 (f) to Tekstrom's Violation

As one defense to imposition of the one year debarment, Tekstrom asserts that since its violation of failing to make secondary inquiries is not mentioned in 20 C.F.R. § 655.810 (f), referral to the Attorney General is not required. As Tekstrom correctly observes, the portion of the regulation that directs the Administrator to provide notice of violations to the Attorney General for disqualification for a specified period of time is 20 C.F.R. § 655.855 (a), which states that the violations requiring such notice are found in "20 C.F.R. § 655.810 (f)." Upon turning to 20 C.F.R. § 655.810 (f), a reader finds no violations listed at all. Instead, the paragraph mentions civil money penalties, back wages and other administrative remedies and essentially provides guidance on how civil money penalties are to be paid. The reference in Section 855 (a) should be to Section 810 (d), which associates a one year debarment with a violation of 20 C.F.R. § 655.810 (b) (1), pertaining to the "displacement of U.S. workers (§ 655.738)." The Section 855 (a) referral to Section 810 (f) appears to be an administrative error.

The resolution of this issue is fairly straightforward for two reasons. First, the statute itself directs the Administrator to make the AG referral. Specifically, 8 U.S.C. § 1182 (n) (2) (C) (i) states that if the Secretary of Labor finds a "failure to meet a condition" relating to the employer's obligation to state on the LCA that neither primary (Section 1182 (n) (1) (E)) nor secondary (Section 1182 (n) (1) (F)) displacement of a United States worker has occurred, "(I) the Secretary shall notify the Attorney General of such finding. . .and, the Attorney General shall not approve petitions filed with respect to that employer. . . during a period of at least 1 year. . ." Any subsequent incorrect internal regulation references obviously do not invalidate the language of the INA associating a secondary displacement violation with a one year disqualification referral.

Second, the incorrect reference in Section 855 (a) has a *de minimis* effect on the Administrator's regulatory authority because it is not the only paragraph in Part 655 that directs the Administrator to notify the Attorney General of violations. Notably, 20 C.F.R. § 655.810 (d) also 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. . . for. . . at least one year for violation (s) of any of the provisions specified. . ." in Section 810 (b), which includes the displacement of U.S. workers. In light of this language, Section 855 (a) may be read as simply providing a cross-reference (albeit incorrect), rather than serving as the enabling provision.

Consequently, based both on the language of the enacting statue, 8 U.S.C. § 1182 (n), and 20 C.F.R. § 655.810 (d), the incorrect reference in Section 855 (a) and the corresponding

absence of any language about violations in the referenced Section 810 (f) provides no defense for Tekstrom.

C. Absence of 20 C.F.R. § 655.810 (d) Citation in Determination Letter

Closely related to the Section 855 (a) reference issue, Tekstrom maintains the Administrator's failure to specifically cite 20 C.F.R. § 655.810 (d) in the Determination Letter represents insufficient notice of the Administrator's authority to initiate the disqualification procedure. Absent that notice, the Administrator does not have authority to make a referral to the Attorney General in this case.

In the Determination Letter, the Administrator indicates that a violation had been found under the provisions of 8 U.S.C. § 1182 (n). As a result, from a legal perspective, the Determination Letter does inform Tekstrom of the Secretary's principal source of authority in this enforcement action – the statute. Further, from a fairness consideration, within the four corners of the Determination Letter and its attachment, Tekstrom was placed on sufficient notice that the two intended remedies were a) $3,400 in civil money penalties, and b) referral to the Attorney General for a one year disqualification. Tekstrom's understanding of those intended consequences was readily demonstrated in its April 2, 2003 request for a hearing. At that time, Tekstrom stated the hearing request was presented "for the simple reason that one-year debarment penalty imposed on Tekstrom is out of proportion." Additionally, I note that not until the filing of its Motion for Summary Decision did Tekstrom suggest any confusion about the Administrator's authority for making the Attorney General referral.

The Determination Letter sufficiently provided both legal and factual information to place Tekstrom on fair notice of the alleged violations and intended consequences. The lack of a specific citation to 20 C.F.R. § 655.810 (d) does not deprive the Administrator of the authority to notify the Attorney General of the violations in this case.

D. Violation Displacing a U.S. Worker versus Failure to make Displacement Inquiry

In the regulation, Section 655.810 (d) (1) relates the one year disqualification period to a violation of the provisions of 20 C.F.R. §§ 655.810 (b) (1) (i) to (iii). In turn, Section 655.810 (b) (1) (i) states: "A violation pertaining to . . . displacement of U.S. workers (§ 655.738)." Maintaining the later reference only involves the actual displacement of a U.S. worker, and asserting that failure to make a displacement inquiry is a different offense, Tekstrom believes the Section 655.810 (b) (1) (i) reference and corresponding one year disqualification in Section 810 (d) (1) do not apply to its violation.

As noted by Tekstrom, under the regulation, 20 C.F.R. § 655.805 (a) (8), failure to make a displacement inquiry, is considered a distinct violation, separate from the actual displacement of a U.S. worker, 20 C.F.R. §§ 655.805 (a) (7) and (10). However, the purported defense based on the sole use of the term "displacement of U.S. workers" in Section 655.810 (b) (1) (i) is overcome by the specific language of the statute and a parenthetical reference in the regulation.

The regulatory sanction provision in 20 C.F.R. § 655.810 (d) (1) ($1,000 in civil money penalty and a one year disqualification) is based on 8 U.S.C. 1182 (n) (2) (C) (i) (I) and (II). In Section 1182 (n) (2) (C) (i) through the use of subparagraphs I and II, the statute imposes a civil money penalty up to $1,000 and a one year disqualification for violations of both the primary displacement LCA condition, Section 1182 (1) (E), and the secondary displacement inquiry LCA condition, Section 1182 (1) (F). So, although the sole use of "displacement of U.S. workers" in 20 C.F.R. § 655.810 (b) (1) (i) might suggest the sanction is applicable only in situations involving the actual displacement of a U.S. worker, the statutory language definitively applies the sanction to both actual displacement and failure to make the secondary displacement inquiry. Consequently, the clear language of the statute controls over any perceived regulatory uncertainty.

As attempted clarification, 20 C.F.R. § 655.810 (b) (1) (i) cross-references Section 655.738 as a parenthetical modifier to its term "displacement of a U.S. worker." Containing the term "non-displacement of U.S. workers" in its caption, Section 655.738 sets out the specific responsibilities of an H-1B dependent employer concerning both direct displacement situations, 20 C.F.R. § 655.738 (c), and secondary displacement scenarios, 20 C.F.R.§ 655.738 (d). Included in the secondary displacement situation is the obligation to make displacement inquiries of secondary/other employers, 20 C.F.R. 655.738 (d) (5). Thus, a fair reading of Section 738 indicates the phrase "non-displacement of U.S. workers" in the section's title is a general term covering obligations associated with both direct, or actual, displacement and secondary displacement of U.S. workers. Correspondingly, the reference to Section 655.738 in Section 655.810 (b) (1) (i) reflects an intention to give broad meaning to the term "displacement of a U.S. worker." In other words, by referencing Section 655.738 in connection with displacement of U.S. workers, Section 655.810 (b) (1) (i) reasonably draws in both direct displacement and secondary displacement obligations, making failure to make a secondary displacement inquiry a Section 655.810 (b) (1) (i) violation, which then triggers the Section 655.810 (d) (1) one year disqualification.

E. Knowledge Defense

Other than one placement with its own client business, Tekstrom placed the nonimmigrant workers obtained through the H-1B program with its vendors who in turn placed the nonimmigrant workers with their own client businesses throughout the country. Because Tekstrom had contractual relationship only with the vendors, it was not aware of the vendor's client businesses.[11] Since Tekstrom did not know these tertiary employers, it asserts the language of the statute precludes imposition of the one year disqualification sanction. Specifically, as a prerequisite to the Attorney General's imposition of the one year

[11]Tekstrom did not strongly contest its obligation to make secondary displacement inquiries even when its vendors are actually placing the nonimmigrant workers with tertiary employers. To the extent its knowledge defense raises that issue, I find Tekstrom does have a duty to make secondary displacement inquiries even when its vendors make the employment placement. In setting out the secondary displacement inquiry obligation of an H-1B dependent employer, the statute, 8 U.S.C § 1182 (n) (1) (F), speaks in terms of placing the nonimmigrant worker with "another employer." Likewise, the regulation, 20 C.F.R. § 655.738 (d), uses the phrases "another employer" and "a secondary or other employer (emphasis added). Additionally, the regulation specifically notes that the secondary or other employer may "often be (but is not limited to) the client or customer of the H-1B employer" (emphasis added), 20 C.F.R. § 655.738 (d) (3).

disqualification sanction, 8 U.S.C. § 1182 (n) (2) (E) requires the Secretary of Labor to make a specific finding that the H-1B dependent employer knew, or had reason to know, of a displacement of a U.S. worker.

In addressing this issue, a more detailed review of various types of violations and sanctions associated with the employment of H-1B nonimmigrant workers is helpful. In general terms, balancing various interests, Congress established a two part program in 8 U.S.C. § 1182 (n) to permit aliens to work temporarily in the United States in specialty occupations. In the first part, to facilitate prompt approval of applications for work visas, the LCA process was set up by Section 1182 (n) (1) to permit issuance of visas based on an employer's promise that certain conditions had been, or would be, fulfilled. As a result, every employer must agree to comply with several primary conditions relating to a) the nonimmigrant workers' wages and working conditions (Sections 1182 (n) (1) (A) (i) and (ii) and 20 C.F.R. §§ 655.731 and 732); b) the absence of a labor strike or lockout at the place of employment (Section 1182 (n) (1) (B) and 20 C.F.R. § 655.733); and, c) notice to the employer's employees or their union (Section 1182 (n) (1) (C) and 20 C.F.R. § 655.734).

In addition to the principal certifications set out above, an H-1B dependent employer must also a) attest that the employer will not displace a U.S. worker within 90 days of the nonimmigrant's placement (Section 1182 (n) (1) (E) and 20 C.F.R. §655.738); b) if the nonimmigrant is to be placed with another employer, inquire of the other employer whether the other employer has, or intends to, displace a U.S. worker within 90 days of placement (Section 1182 (n) (1) (F) and 20 C.F.R.§ 655.738); and, c) take good faith steps to recruit U.S. workers for the intended nonimmigrant worker's position (Section 1182 (n) (1) (G) and 20 C.F.R. § 655.739).

In the second part, Section 1182 (n) (2), to ensure that U.S. workers are not actually harmed or displaced by the H-1B nonimmigrant workers, Congress gave the Secretary, U.S. Department of Labor, investigative and enforcement powers. Through application of this authority, and the regulation, 20 C.F.R §§ 655.800 to 855, the Secretary ensures that employers obtaining H-1B nonimmigrant workers comply with the conditions, or representations, made on the LCAs to support the H-1B visas. Failure to meet the LCA conditions are considered violations of the INA statute and are separated into five separate categories, distinguished by the subject matter of the LCA condition and the employer's state of mind, as set out below:

1. Simple non-compliance (Section 1182 (n) (2) (C) (i)) – failure to comply with:

a. The principal LCA certification that a strike or lockout is not ongoing at the employment site for the nonimmigrant. Section 1182 (n) (1) (B) and 20 C.F.R. § 655.805 (a) (4).

b. The H-1B dependent employer certification that the employer did not, and will not, displace a similarly employed U.S. worker at its worksite within 90 days of the nonimmigrant worker's placement. Section 1182 (n) (1) (E). Apparently, the Secretary has interpreted this provision to also include displacement of a U.S. worker by a secondary or other employer. In setting out this violation, 20 C.F.R. § 655.805 (7)

states, "Displaced a U.S. worker (including displacement of a U.S. worker employed by a secondary employer at the worksite where an H-1B employee is placed). . ."

c. The H-1B dependent employer certification that prior to placing a nonimmigrant worker with another employer, the H-1B dependent employer inquired of the other employer whether the other employer displaced, or intends to displace, one of its employees who is a U.S. worker. Section 1182 (n) (1) (F) and 20 C.F.R. § 655.805 (a) (8).

2. Substantial Failure (Section 1182 (n) (2) (C) (i)) – significant noncompliance with:

a. The principal LCA certification that a notice of the LCA filing has been provided to the employer's employees or their union. Section 1182 (n) (1) (C) and 20 C.F.R. § 655.805 (a) (5).

b. The H-1B dependent employer certification that a good faith effort has been made to recruit U.S. workers. Section 1182 (n) (1) (G) (i) (I) and 20 C.F.R. § 655.805 (a) (9).

3. Willful Failure (Section 1182 (n) (2) (C) (ii) and 20 C.F.R. 655.805 (c)) – knowing failure to comply, or reckless disregard for compliance, with:

a. The principal LCA certification that the employer is offering the nonimmigrant worker wages that are at least equal to the actual wage level paid by the employer to other similarly situated employees, or the prevailing wage for the occupation in the area of employment. Section 1182 (n) (1) (A) (i) and 20 C.F.R. § 655.805 (a) (2).

b. The principal LCA certification that the employer will provide working conditions for the nonimmigrant worker that will not adversely affect the working conditions of other similarly situated employees. Section 1182 (n) (1) (A) (ii) and 20 C.F.R. § 655.805 (a) (3).

c. The principal LCA certification that a strike or lockout is not ongoing at the employment site for nonimmigrant. Section 1182 (n) (1) (B) and 20 C.F.R. § 655.805 (a) (4).

d. The principal LCA certification that a notice of the LCA filing has been provided to the employer's employees or their union. Section 1182 (n) (1) (C) and 20 C.F.R. § 655.805 (a) (5).

e. The H-1 B dependent employer certification that the employer did not, and will not, displace a similarly employed U.S. worker at its worksite within 90 days of the nonimmigrant worker's placement. As discussed above, this provision includes displacement of a U.S. worker by a secondary or other employer. Section 1182 (n) (1) (E) and 20 C.F.R. § 655.805 (a) (7).

f. The H-1B dependent employer certification that prior to placing a nonimmigrant worker with another employer, the H-1B employer inquired of the other employer whether the other employer displaced, or intends to displace, one of its employees who is a U.S. worker. Section 1182 (n) (1) (F) and 20 C.F.R. § 655.805 (8).

g. The H-1B dependent employer certification that a good faith effort has been made to recruit U.S. workers. Section 1182 (n) (1) (G) (i) (I) and 20 C.F.R. § 655.805 (9).

4. Willful Failure/Actual Displacement – when the employer's willful failure, as set out above in No. 3, causes the actual displacement of a U.S. worker.

5. Compliance/Knowledge of Actual Displacement – even if an H-1B dependent employer has complied with Section 1182 (n) (1) (F) in placing a nonimmigrant worker with a secondary employer, a violation of the LCA conditions occurs if a) the other employer either displaced or displaces one of its U.S. employees within 90 days of the nonimmigrant worker's placement; and, b) the H-1B dependent employer knew, or had reason to know, of such displacement at the time of the nonimmigrant worker's placement. Section 1182 (n) (2) (E).

In summary, the statute sets out five categories of violations directly associated with the LCA conditions: failure, substantial failure, willful failure, willful failure causing displacement of a U.S. worker; and, H-1B inquiry compliance with knowledge of actual displacement of a secondary employer's employee. Based on these distinct categories of violations, the statute lists corresponding sanctions in terms of civil monetary penalties and disqualification, as set out below:

1. Failure violation – a civil money penalty not to exceed $1,000 and Secretarial referral to the Attorney General for a one year disqualification. Sections 1182 (n) (2) (C) (i) (I) and (II) and 20 C.F.R. § 655.810 (b) (1) (i) and (d) (1).

2. Substantial failure violation - a civil money penalty not to exceed $1,000 and Secretarial referral to the Attorney General for a one year disqualification. Sections 1182 (n) (2) (C) (i) (I) and (II) and 20 C.F.R. §§ 655.805 (b), 655.810 (b) (1) (i) and (d) (1).

3. Willful (knowing or reckless disregard) violation - a civil money penalty not to exceed $5,000 and Secretarial referral to the Attorney General for a two year disqualification. Sections 1182 (n) (2) (C) (ii) (I) and (II) and 20 C.F.R. §§ 655.805 (b), 655.810 (b) (2) (i) and (d) (2).

4. Willful violation and actual displacement - a civil money penalty not to exceed $35,000 and Secretarial referral to the Attorney General for a three year disqualification. Sections 1182 (n) (2) (C) (i) (I) and (II) and 20 C.F.R. § 655.810 (b) (3) (i) and (d) (3).

5. Inquiry compliance and subsequent knowledge of displacement of a secondary employer's U.S. employee – Secretarial referral to the Attorney General for a disqualification ranging from one year to three years. Section 1182 (n) (2) (E).

Having detailed five statutory violations and corresponding sanctions, I return to Tekstrom's defense that the one year disqualification may not be imposed because Tekstrom did not know the tertiary employers of its H-1B nonimmigrant workers. To support that proposition, Tekstrom cites the language in Section 1182 (n) (2) (E) which precludes imposition of disqualification unless the H-1B dependent employer was aware of the displacement violation by the other employer. As set out above, the sanction terms in Section 1182 (n) (2) (E) relate only to a category number five violation, when the H-1B dependent employer has placed a nonimmigrant worker with the secondary employer in accordance with Section 1182 (n) (1) (F) and nevertheless the secondary employer displaces a U.S. worker. Clearly, that type of violation did not occur in Tekstrom's case because the company did not comply with the inquiry requirement. Rather, the cited violation against Tekstrom is the failure to make displacement inquiries of secondary employers as required by 8 U.S.C. 1182 (n) (1) (F) which is a category number one violation - failure or simple non-compliance. This type of violation has no knowledge element. Simple failure to comply with the applicable LCA condition is a violation that leads to a one year disqualification sanction. Consequently, for this offense, Tekstrom's lack of knowledge of the tertiary employers is not a defense.[12]

Principal Issue

Upon a finding that an H-1B dependent employer has failed to make secondary displacement inquiries as required by 8 U.S.C. § 1182 (n) (1) (F), Section 1182 (n) (2) (C) (i) (I) states the "Secretary shall notify the Attorney General of such finding. . ." The next subparagraph (II) then states "the Attorney General shall not approve" the employer's visa petitions for at least one year.[13] In light of the use of the word "shall," the principal issue in this case concerns the discretion available to the Secretary in referring Tekstrom's violations to the Attorney General for imposition of a one year disqualification on obtaining visas for H-1B nonimmigrant workers under the provisions of 8 U.S.C. 1182 § (n) (C) (i) (II), as implemented by 20 C.F.R. §§ 655.810 (b) (1) (i) and (d) (1).

Understandably, Tekstrom asserts the word "shall" in Secretarial notification context should have the same meaning as the word "shall" in the investigative provisions of the statute and regulation which I determined in a pre-hearing motion to be discretionary. Further, Tekstrom presents a strong mitigation case under the factors set out in 20 C.F.R. § 655.810 (c). Notably, in Tekstrom's favor a) no U.S. or nonimmigrant worker was adversely affected by Tekstrom's administrative error; b) Tekstrom has no history of previous violations; c) the failure to make the secondary displacement inquiries was neither substantial nor willful; d) Tekstrom promptly cooperated with the Administrator's investigation; and, e) Tekstrom has initiated procedures to assure future compliance.

[12]To the extent Tekstrom's lack of knowledge might be viewed as an impossibility of compliance defense, I simply note that the regulation, 20 C.F.R. § 655.738 (d) (5) (i) (C), provides at least one means for compliance, a non-displacement contract clause, that could satisfy the inquiry obligation even where the H-1B dependent employer may not know the tertiary employers. Further, as part of its future compliance efforts, Tekstrom has inserted a non-displacement clause in four contracts with different vendors, executed between August 2002 and July 2003. *See* Exhibit E to Joint Stipulations of Fact.

[13]Regardless of my determination on this issue, I have no jurisdiction to determine whether the Attorney General has any discretion in imposing the one year disqualification under 8 U.S.C. 1182 (n) (2) (C) (i) (II).

In apparent acknowledgement of these numerous mitigation factors in Tekstrom's favor, the Administrator significantly reduced the amount of the civil money penalty for Tekstrom's fourteen violations,[14] as required by 20 C.F.R. § 655.810 (c). However, the language of 20 C.F.R. § 655.810 (c) applies mitigation consideration only to civil money penalties. The regulation contains no similar relief in regards to the disqualification sanction, even though the one year disqualification may be a more severe sanction than application of the maximum civil money penalty, as asserted by Tekstrom. As a result, Tekstrom reasonably maintains that reducing the civil money penalty based on extensive mitigation while at the same time still imposing the one year disqualification produces an inconsistent and unfair result.

I have carefully considered both the logical and equitable strengths of Tekstrom's assertion that the Secretary should exercise discretion in this particular case and not refer Tekstrom's violations to the Attorney General for initiation of the one year disqualification. However, based on the specific language of the relevant statutory sanction provision, consideration of that referral sanction provision within the context of the entire LCA statute, and review of a previous Secretarial decision on the issue, I conclude the Secretary does not have discretion under 8 U.S.C. § 1182 (n) (2) (C) (i) (I) concerning notification and must refer the finding of Tekstrom's violations to the Attorney General for imposition of the one year disqualification.

A. Section 1182 (n) (2) (C) (i) (I)

Significantly, in 8 U.S.C. § 1182 (n) (2) (C) (i) (I), through the use of two contrasting operative words, Congress unequivocally established its intention in regards to the application of disqualification. After stating that the Secretary "shall" provide violation notification to the Attorney General for disqualification, the subparagraph continues, ". . .and may, in addition, impose other administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per violation). . ." (emphasis added). This use of "shall" and "may" in the same sanction provision clearly reflects congressional intent that the first command concerning notification/disqualification is mandatory while the imposition of other administrative remedies, such as a civil money penalty, is within the discretion of the Secretary.[15]

[14] *See also* Exhibit 1 to Prosecuting Party's Motion for Summary Judgment

[15] As I noted in my pre-hearing motion decision, the courts have provided an analytical framework for assessing whether an investigative provision's use of "shall" is mandatory. Applying that case law to the investigative provision, 8 U.S.C. § 1182 (n) (2) (B), I concluded "shall" was a discretionary instruction. In contrast, cases on enforcement provisions provide less guidance and usually are determined by the facts of the specific case. Thus, due to a lack of definitive case law, and in light of the use of both "shall" and "may" in this enforcement provision, my finding that "shall" acts as a mandatory command in this enforcement provision is not completely inconsistent with my earlier pre-hearing interpretation of "shall" as discretionary in the investigative subparagraph.

B. Section 1182 (n)

Placing the enforcement provision within the context of the LCA statute's purpose and considering the interests the law protects, further supports a finding that Congress used "shall" to establish a mandatory command. To effectuate the H-1B program and the temporary employment of nonimmigrant workers in specialty occupations, Congress balanced three interests: streamlining the employer's application process, protecting nonimmigrant workers, and protecting U.S. workers. The first consideration is met with the prompt review of an employer's LCA for completeness and obvious inaccuracies.

The other two interests involving both nonimmigrant and U.S. workers are protected through the statute's complaint driven enforcement process.[16] A portion of that enforcement program has been outlined above in terms of violations and related sanctions and shows extensive congressional deliberation on, and the importance of, workers' protections. H-1B nonimmigrant workers are protected by the principal LCA conditions relating to their wages and working conditions, which also indirectly protect the wages and working conditions of U.S. workers. U.S. workers are protected by another principal LCA condition concerning strikes and lockout to preclude the use of nonimmigrant workers to replace striking U.S. workers. The employer seeking to bring in H-1B nonimmigrant workers must certify a strike or lockout is not ongoing at the intended worksite. Additionally, as another protection of U.S. workers, an employer must also provide notice to its employees, or their union, of its intention to place nonimmigrant workers at the worksite.

If an employer uses a sufficient number of nonimmigrant workers to be designated an H-1B dependent employer, U.S. workers are provided further protection by requiring the H-1B dependent employer to promise that none of its U.S. employees will be displaced. The H-1B employer also has to promise to inquire of another employer about displacement of U.S. workers prior to placing a nonimmigrant worker with that other employer. Finally, the H-1B dependent employer must indicate that a good faith effort to recruit U.S. workers for the nonimmigrant workers' position has been made.

In addition to providing several provisions for protection of nonimmigrant workers and U.S. workers, the detailed structure of the enforcement program, with emphasis on simple, substantial, and willful failure violations, as previously outlined above, shows extensive congressional deliberation on the relative importance of these worker protections and a preference for U.S. workers' rights over the rights of nonimmigrant workers. Notably, an employer who fails to comply with the LCA conditions about nonimmigrant worker wages and working conditions is subject to sanctions only if its violation was willful. An employer's inadvertent, or unknowing, failure to comply with the nonimmigrant worker protections invokes no sanction.

In contrast, U.S. workers' rights appear to be more important because an employer may be sanctioned for even an unknowing, or non-willful, failure to comply with the five U.S. worker-related LCA conditions. Apparently based on the potential direct impact on U.S.

[16] *See Kolbusz-Kline v. Technical Career Institute*, 1993 LCA 4 (Sec'y July 18, 1994).

workers, violations of these five LCA conditions are separated into two categories of significance. The two LCA conditions which have a less obvious, direct impact on U.S. workers - failure to recruit U.S. workers in good faith and to provide LCA notice to employees - require imposition of a sanction against the offending employer, or H-1B dependent employer, if the violation was substantial.

Significantly, simple non-compliance with the three remaining LCA conditions which directly relate to loss of work by U.S. employees - strike/lockout, displacement, and secondary displacement inquiry – produces a sanction under the statute. As a result, an employer who fails to comply with the strike/lock out LCA condition, and an H-1B dependent employer who doesn't comply with the additional LCA conditions concerning direct displacement and secondary displacement inquiries, are subject to the sanction provisions, even if the failures to comply were neither substantial nor willful.

Thus, through this extensive scheme of violations and associated sanctions, Congress has carefully balanced an employer's need for a rapid LCA approval process with the graduated interests of nonimmigrant workers and U.S. workers. Such close scrutiny of the relative impact of an employer's failure to comply with the LCA conditions on both types of workers surely supports a finding that Congress' use of the term "shall" in the sanction provisions was purposeful and significant. Interpreting the term otherwise would diminish Congress' apparent conclusion that LCA conditions directly impacting the employment of U.S. workers, including the secondary displacement inquiry requirement under Section 1182 (n) (1) (F), are the most important conditions and warranted the highest degree of protection through sanctions.

C. Secretarial Interpretation

In *Kolbusz-Kline v. Technical Career Institute*, 1993 LCA 4 (Sec'y July 18, 1994), the Secretary determined an H-1B dependent employer had violated an LCA condition by substantially failing to provide notice of the LCA to its employees' union.[17] After considering many of the extenuation and mitigation factors in 20 C.F.R. § 655.810 (c), which are also applicable to Tekstrom, including the possibility that the failure was unintentional, the Secretary reduced the amount of the civil money penalty. However, the Secretary also advised the parties that since the violation must be reported to the Attorney General and ETA, the Administrator's notification to the Attorney General was proper.

In footnote seven of his opinion, the Secretary acknowledged the argument that the disqualification was too harsh a sanction. He observed that during deliberations on the statute two senators had emphasized the need in setting sanctions to distinguish between willful failure to comply with an LCA condition and a good faith failure. However, the Secretary also noted that the senators' comments applied only to the two LCA conditions involving the nonimmigrant worker's wages and working conditions. *Id*. Their concern did not extent to the employee notification requirement before the Secretary. As a result, even though the case before the Secretary may have involved a good faith failure by the employer and a reduction in the assessed civil money penalty was warranted, he remained convinced the Attorney General

[17]Although this case involved a substantial failure, the same sanction provision, 8 U.S.C. § 1182 (n) (2) (C) (i) (I), applies to both simple failure and substantial failures to comply. 8 U.S.C. § 1182 (n) (2) (C)(i).

notification was proper. The Secretary explained in part that "the plain language of the INA and the regulation. . . dictate the result. . ."

For the reasons previously discussed, including both the plain language of 8 U.S.C. § 1182 (n) (2) (C) (i) (I) and the violation/sanction structure of LCA statute, Section 1182 (n), I find insufficient reason to depart from the Secretary's interpretation.

Conclusions

Tekstrom violated an LCA condition in 8 U.S.C. § 1182 (n) (1) (F) by failing to make secondary displacement inquiries of its client business and vendors prior to placement of H-1B nonimmigrant workers. None of the asserted regulatory deficiencies preclude imposition of the sanctions established by 8 U.S.C § 1182 (n) (2) (C) (i) (I). Likewise, the absence of Tekstrom's knowledge of the tertiary employers does not remove its culpable responsibility for compliance with the LCA condition in Section 1182 (n) (1) (F). Tekstrom could have reasonably met its obligations through a secondary displacement inquiry of its client business, non-displacement assurances from its vendors, or a non-displacement contract clause. The language of the sanction provision, the structure of the LCA statute, and a Secretarial interpretation of the disqualification provision lead to the conclusion that Secretarial notification of Tekstrom's violation to the Attorney General is mandatory. Finally, based on the parties' stipulation of fact (number 41), the civil money penalty of $3,400.00 is appropriate for the cited violations.

Accordingly, the Administrator's decision in the March 20, 2003 Determination Letter must be affirmed.

ORDER

The decision of the Administrator in this matter as set out in the Administrator's Determination Letter, dated March 20, 2003, is **AFFIRMED**. Having violated the Labor Certification Application condition in 8 U.S.C. 1182 (n) (1) (F) (ii), and pursuant to 8 U.S.C. 1182 (n) (2) (C) (i) (I):

1. The Respondent, CYBERWORLD ENTERPRISE TECHNOLOGIES, INC. d/b/a TEKSTROM **SHALL PAY** a civil monetary penalty of $3,400.00, plus interest and appropriate additional administrative penalty, to U.S. Department of Labor Wage and Hour Division, as specified in the Determination Letter; and,

2. The Attorney General and the U.S. Department of Labor Employment and Training Administration **SHALL BE NOTIFIED** of the Respondent's violation.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date signed: December 23, 2003
Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR § 655.845, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within 30 calendar days of the date of the Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge.