

ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

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In the Matter of: *
*
ADMINISTRATOR, WAGE AND HOUR *
DIVISION, U.S. DEPARTMENT OF *
LABOR, *
*
Prosecuting Party, *
*
v. *
*
BROADGATE, INC., *
*
Respondent. *
*

ARB CASE NO. 2019-0079

ADMINISTRATOR’S OPENING BRIEF

The Administrator (“Administrator”) of the Wage and Hour Division (“WHD”) of the Department of Labor (“Department”) hereby files her Opening Brief in this matter, which arises under the H-1B provisions of the Immigration and Nationality Act (“INA”). *See* 8 U.S.C. 1101(a)(15)(H)(i)(b); 8 U.S.C. 1182(n) *et seq.* The Administrator requests that the Administrative Review Board (“ARB” or “Board”) reverse that part of Administrative Law Judge (“ALJ”) Steven D. Bell’s August 7, 2019 Decision and Order (“D&O”) that ruled that a WHD District Director was not authorized to issue a H-1B determination letter to Broadgate on December 28, 2018 (“determination letter”).

The ALJ concluded that the Administrator had the burden to prove that the District Director possessed authority to issue the determination letter and failed to satisfy it. The ALJ’s conclusion constitutes error because it rejects the well-established principle that the official acts

of government representatives, such as the issuance of the determination letter by the District Director, are entitled to a presumption of regularity and that the burden to rebut the presumption through clear evidence is on the party challenging the government official's authority to act. Moreover, the District Director is a designee of the Administrator pursuant to 20 C.F.R. 655.715, charged with performing Administrator functions such as issuing determination letters; this further demonstrates that the ALJ erred when he concluded that the District Director lacked authority. For both of these reasons, the Administrator requests that the Board reverse that part of the Administrator's decision that ruled the District Director lacked authority to issue the determination letter.¹

ISSUE

Whether the ALJ erred by concluding that the District Director did not have authority to issue the H-1B determination letter at issue.

STATUTORY AND REGULATORY FRAMEWORK

The H-1B visa program, created via an amendment to the Immigration and Nationality Act ("INA"), permits the temporary employment of nonimmigrants in specialized occupations in the United States. *See* 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n); 20 C.F.R. Part 655, subparts H

¹ While the ALJ ultimately concluded that the District Director did not have the authority to issue the determination letter, he also made findings of fact and conclusions of law based on the evidence the parties presented at trial. *See* D&O at 37-43. Specifically, the ALJ found that the Administrator proved by a preponderance of the evidence that Broadgate willfully and substantially committed the same H-1B program violation (failing to provide notice of the filing of the LCA) on 14 occasions. *Id.* at 39, ¶29. Therefore, should the Board overturn the ALJ's invalidation of the determination letter, it should, in the exercise of its de novo review and for the reasons outlined below, adopt the ALJ's finding that Broadgate committed 14 willful and substantial H-1B program violations and debar Broadgate for two years in accordance with the mandatory debarment provisions at 8 U.S.C. 1182(n)(2)(C)(ii) and 20 C.F.R. 655.810(d)(2). *See infra.*

and I. In order to employ an H-1B worker, an employer must first submit a Labor Condition Application (“LCA”) to the Secretary of Labor. *See* 8 U.S.C. 1182(n)(1). The LCA contains conditions that, if applicable, the employer promises to satisfy. *Id.* at (A)-(F).

The INA requires the Secretary of Labor to establish a process to receive, investigate, and dispose of H-1B complaints alleging that an employer failed to satisfy an LCA condition. *See* 8 U.S.C. 1182(n)(2)(A). The Secretary has delegated his authority to administer and enforce H-1B program requirements to the WHD Administrator. *See* Sec’y’s Order 01-2014, Delegation of Authority and Assignment of Responsibility to the Administrator, Wage and Hour Division, 79 Fed. Reg. 77,527-28 (Dec. 19, 2014) (“Secretary’s Order”).² In accordance with the Secretary’s delegation, the Administrator has issued implementing regulations to administer and enforce H-1B program requirements pursuant to a complaint process. *See* 20 C.F.R. 655.700-855. The implementing regulations specify that the “Administrator shall perform all the Secretary’s investigative and enforcement functions under . . . 8 U.S.C. 1182(n)” 20 C.F.R. 655.800(a). The regulations define the term Administrator to include not only the Administrator herself but also “such authorized representatives as may be designated to perform any of the functions of the Administrator” 20 C.F.R. 655.715.

When the Secretary finds, after notice and an opportunity for a hearing, “willful” failures to satisfy the conditions to which an employer attests in the LCA, he may assess civil monetary penalties (“CMPs”), as pertinent here, of up to \$7,520 per violation. *See* 8 U.S.C. 1182(n)(2)(C)(ii)(I);³ 20 C.F.R. 655.810(b)(2)(i) (effective Jan. 2, 2018). The Administrator

² The Secretary’s Order provides that “all of the authorities delegated in this Order may be redelegated.” Sec’y’s Order 01-2014 ¶ 7.

³ The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (“IAA”), *see* Pub. L. 114-74, sec. 701, requires agencies to adjust CMP levels for inflation through an initial

applies seven regulatory factors to determine an appropriate CMP for a willful violation. *See* 20 C.F.R. 655.810(c). In addition to CMPs, an employer is subject to a minimum two-year debarment when the Secretary finds that the employer committed qualifying willful violations. *See* 8 U.S.C. 1182(n)(2)(C)(ii); 20 C.F.R. 655.810(d)(2).

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

This matter commenced when a Broadgate H-1B worker filed a complaint with WHD. D&O at 2. A WHD investigator, who testified under oath that he had previously investigated approximately 25 other H-1B matters, conducted an investigation based on the complaint. *Id.*; Transcript (“Tr.”), page (“p.”) 51 (May 21, 2019). After completing his investigation, the investigator informed Broadgate of the violations he expected to cite. Tr., p. 43. When Broadgate and WHD failed to resolve all the violations the investigator was planning to cite, Ms. Timolin Mitchell, the District Director of the office out of which the investigator worked, issued the December 28, 2018 determination letter with the investigator’s assistance. Tr., p. 44.

Broadgate sought a hearing to challenge the determination letter’s finding that the company committed four types of H-1B program violations. D&O at 4. Broadgate agreed by stipulation to withdraw its request for a hearing on three of the four types of violations. *Id.* The only type of violation remaining for disposition by the ALJ was the Administrator’s finding that Broadgate had committed 16 willful and substantial failures to post notice of the LCA’s filing at the actual worksite of the H-1B worker. *Id.* at 5, 13. The Administrator had assessed a \$4,136 CMP for each of the 16 violations for a total CMP figure of \$66,176. *Id.* at 13. The determination letter also imposed the statutorily mandated two-year debarment remedy for the willful violations.

adjustment by August 1, 2016, followed by annual adjustments every January thereafter. Based on the applicable annual IAA adjustment, the maximum CMP figure per willful violation here is \$7,520.

The December 28, 2018 determination letter was not the first time that Ms. Mitchell had issued an H-1B determination letter to Broadgate; she had also issued the company such a determination letter in 2013 based on an earlier H-1B investigation. Joint Exhibit (“JX”) 10. Broadgate admitted that during the investigation culminating in Ms. Mitchell’s 2013 determination letter, the WHD investigator informed the company that it must post notice of the LCAs at the actual worksite of the H-1B worker. *See Stipulated Facts*, ¶15. Broadgate additionally admitted that in 2013, its attorneys informed the company that it must post notice of the LCAs at the actual worksite of the H-1B worker. *Id.*; JX 7, May 17, 2013 Letter to Broadgate from Counsel (“[I]t is mandatory that you post an LCA notice at the actual work location where the H-1B beneficiary will work.”).

On May 15, 2019, just six days prior to the scheduled May 21, 2019 hearing, Broadgate, for the first time, questioned Ms. Mitchell’s authority to issue the determination letter. *Id.* at 5. WHD objected to the timing of Broadgate’s argument, contending it constituted an affirmative defense that Broadgate was required to raise earlier in the proceeding. *Id.* at 20. The ALJ, in his August 7, 2019 D&O, rejected WHD’s timeliness argument, reasoning that no specific timing requirements applied to asserting such a possible defense “in an administrative enforcement action that was not commenced by the filing of a ‘pleading.’” *Id.* at 22.

The ALJ, crucially for purposes of this appeal, also rejected the Administrator’s argument that the presumption of regularity required the ALJ to presume that Ms. Mitchell was authorized to issue the determination letter. D&O at 34-37. The ALJ first acknowledged that the presumption applies in federal courts with respect to the acts of public officials like Ms. Mitchell. *Id.* at 34, 37. He nevertheless concluded that the H-1B implementing regulations do not permit application of the presumption in an ALJ proceeding, reasoning that

20 C.F.R. [] 655.840(a) requires me to make a record and make a merits-based decision as to whether the District Director was cloaked with the authority to issue the Administrator’s determination . . . on December 28, 2018. I do not believe the Regulations permit me to employ a presumption to decide whether the District Director acted with authority. I will not employ a presumption of regularity to answer that question.

Id. at 37.

Rather than apply the presumption, which would have placed the burden on Broadgate to prove by clear evidence that Ms. Mitchell lacked authority to issue the determination letter, *see supra*, the ALJ instead concluded the opposite: that the Administrator had the burden to prove that Ms. Mitchell was authorized to issue the determination letter. D&O at 22-24. Specifically, the ALJ opined that the Administrator must prove that she redelegated her enforcement authority (which she has from the Secretary of Labor) to Ms. Mitchell. *Id.* at 27. He further reasoned that to satisfy this burden, the Administrator must show that she took “some unambiguous action to affirmatively re-delegate her enforcement power to those below her in the organizational chart of the [WHD].” *Id.*

The Administrator introduced a District Director’s Position Description (“PD”) coupled with excerpts from WHD’s Field Operations Handbook (“FOH”) to demonstrate Ms. Mitchell’s authority to issue the determination letter as the Administrator’s authorized representative consistent with the definition of Administrator in 20 C.F.R. 655.715 (which includes “such authorized representatives as may be designated to perform any of the functions of the Administrator . . .”). *See Administrator’s Supplemental Pre-Hearing Statement* ¶¶6-9. The PD renders District Directors like Ms. Mitchell “[r]esponsible for all enforcement activity in the assigned district office jurisdiction.” Administrator’s Exhibit (“AX”) 1. It further authorizes District Directors to “develop and direct [WHD] program operations . . . throughout an assigned

district office geographical jurisdiction,” which “include[s] the . . . enforcement [and] compliance . . . programs conducted under the statutory authority contained in the . . . the [INA] dealing with labor standards under [the] H-1B . . . provision[] of the INA.” *Id.* The FOH, which “is approved by the Administrator,” is the “basic manual for direction and guidance of all [WHD] personnel in the uniform and proper administration and enforcement of the Acts administered by the WHD.” AX 2. It authorizes District Directors to schedule the investigations investigators conduct, decide whether to proceed with certain investigations, and, with respect to H-1B matters, specifically contemplates coordination between investigators and District Directors. *Id.*

The ALJ found that the PD “does not intend to delegate H-1B enforcement authority to the District Director.” D&O at 31. He similarly found that “[n]othing in the [FOH provisions submitted] contains a delegation of H-1B enforcement authority to the District Director.” *Id.* at 34. He accordingly declined to adopt the Administrator’s argument that Ms. Mitchell properly issued the determination letter as the Administrator’s authorized representative under the Department’s H-1B implementing regulations. *Id.*

The ALJ concluded that the Administrator had “proven by a preponderance of the evidence” 14 of the 16 “willful[]” and substantial[]” failures by Broadgate to provide notice of the filing of the LCAs that she had found in the determination letter. D&O at 39, ¶29. Because he also concluded the District Director lacked authority to issue the determination letter, however, the ALJ “reverse[d] the Administrator’s Determination” that Broadgate failed to provide the requisite notices. *Id.* at 43, ¶57. The ALJ also “vacate[d]” the CMPs and debarment that the determination letter had imposed based on the willful and substantial failures to provide the notices. *Id.* ¶58. The ALJ additionally concluded that Broadgate owed the Administrator

\$1,848 in a CMP for one of the other violations it had agreed to withdraw by stipulation. *Id.* at 39, ¶28.

On August 21, 2019, the Administrator filed a Petition For Expedited Review with the Board. On September 20, 2019, the Board issued a Notice Of Intent to Review En Banc and Briefing Schedule in this case. On that same date, the Board issued a similar notice in *Administrator v. Spate Business Solutions*, ARB No. 2019-0083, granting a petition raising essentially the same issue. However, the statement of the issue in *Spate* conformed to the ALJ having ruled there that the employer, rather than the Administrator, bears the initial burden to present evidence when it challenges a District Director’s authority to issue an H-1B determination letter. The Board stated in each of the notices that “[d]ue to the similarity of the issues raised to the instant appeal and contradictory conclusions by the ALJs in their respective decisions, the Board will consolidate these two appeals for purposes of decision.”

STANDARD OF REVIEW

The Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, vests the Board with “all the powers which it would have in making the initial decision.” 5 U.S.C. 557(b). The Board’s review is accordingly de novo. *See Adm’r v. Am. Truss*, ARB Case No. 05-032, 2007 WL 626711, at *1 (ARB Feb. 28, 2007) (citing *Talukdar v. U.S. Dep’t of Veterans Affairs*, ARB Case No. 04-100, 2007 WL 352434, at *6 (ARB Jan. 31, 2007), for the proposition that the Board exercises de novo review in INA cases).

ARGUMENT

THE ALJ ERRED BY CONCLUDING THAT THE DISTRICT DIRECTOR DID NOT HAVE THE AUTHORITY TO ISSUE THE H-1B DETERMINATION LETTER BECAUSE THE WELL-ESTABLISHED PRESUMPTION OF REGULARITY IN REGARD TO THE ACTIONS OF FEDERAL GOVERNMENT OFFICIALS APPLIES HERE, AND BECAUSE THE DISTRICT DIRECTOR WAS ACTING AS THE AUTHORIZED REPRESENTATIVE, BY DESIGNATION, OF THE ADMINISTRATOR IN ENFORCING THE H-1B PROGRAM

1. The Presumption of Regularity Applies to the District Director’s Issuance of a Determination Letter.

A presumption of regularity and legitimacy—that is, a presumption of propriety and lawfulness—attaches to actions taken by federal government officials. *See, e.g., NARA v. Favish*, 541 U.S. 157, 174 (2004); *U.S. Dept. of State v. Ray*, 502 U.S. 164, 179 (1991); *FCC v. Schreiber*, 381 U.S. 279, 296 (1965). The presumption applies when a party challenges a government official’s authority to act, *see R.H. Stearns Co. of Boston, Mass. v. U.S.*, 291 U.S. 54, 62-63 (1934) (presuming IRS Commissioner was authorized to credit tax overassessment), including when a party, as Broadgate does here, specifically questions whether the official was delegated the authority to act, *see Coreas v. Holder*, 526 F. App’x 322, 326 (4th Cir. 2013) (presuming that an official was authorized to issue a written document despite DHS’s inability to answer how it had delegated authority to the official to issue such a document); *Borg-Warner Corp. v. C.I.R.*, 660 F.2d 324, 330 (7th Cir. 1981) (presuming that a federal tax official, “by virtue of a delegation of authority,” was authorized to terminate consideration of a tax case through issuance of a letter); *Lesser v. U.S.*, 368 F.2d 306, 309 (2d Cir. 1966) (presuming official “was acting within delegated authority” when he signed a document).

In addition to establishing the legitimacy of the federal official’s act, the presumption also assures that “[a]cts done by a public officer which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter.” *R.H. Stearns Co.*, 291 U.S. at

63 (internal citations and quotation marks omitted); *Borg-Warner Corp.*, 660 F.2d at 330 (“[I]t is presumed, whenever an official has acted, that whatever is required to give validity to the official’s act in fact exists.”); *Lesser*, 368 F.2d at 309 (noting “it is presumed that [the federal official] was acting within delegated authority” when he issued a written document because, quoting *R.H. Stearns Co.*, “acts done by a public officer which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter”). Thus, the long-established presumption required the ALJ to presume that the District Director was authorized to issue the determination letter.

The presumption is rebuttable, but typically only if the party challenging an action can refute its legitimacy with “clear evidence.” See *Favish*, 541 U.S. at 174 (“[W]here the presumption [of legitimacy] is applicable, clear evidence is usually required to displace it.”) (internal citations and quotation marks omitted); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“[I]n the absence of clear evidence to the contrary, courts presume that [government agents] have properly discharged their official duties.” (quoting *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926))); *Kohli v. Gonzalez*, 473 F.3d 1061, 1068 (9th Cir. 2007) (applying the presumption because the petitioner “has not come forward with any evidence indicating that the person who signed the [notice] lacked the authority to do so”); *DeLeon v. Holder*, 592 F. App’x 216 (4th Cir. 2015) (applying the presumption for the same reason as did the court in *Kohli* and further rejecting the “argument that the presumption only comes into play after determining the public officer’s duties”). Assertions that the government has not affirmatively shown that a government official had authority to take a particular action do not satisfy the clear evidence standard. See *Lesser*, 368 F.2d at 309 (mere assertion that the government failed to show that a delegation had occurred that authorized the official to issue a document was insufficient because

“appellant had to come forward with some evidence indicating an absence of delegation. Since he did not, he cannot prevail”).

Because the burden to refute the official act’s legitimacy rests with the party challenging the government action, courts have not demanded that agencies first produce legal or evidentiary proof that a delegation occurred. *See Coreas*, 526 F. App’x at 326 (presumption applies and burden rests with nongovernmental party even when DHS was “unable to answer how [it] delegated its authority” to the official); *Lesser*, 368 F.2d at 309 (rejecting an argument that the government needed to demonstrate that a particular official had been delegated authority in order to benefit from the presumption of regularity). Nor have courts required a showing that a written delegation of authority exists. *See Kempinski v. Greene*, 292 F.2d 820, 822 (3d Cir. 1961) (rejecting an argument that redelegation of an agency’s authority “was ineffective since it was not in writing” because the court could find “no case or statutory authority to support that contention,” and finding that the applicable agency regulation did not require written delegation). In at least some instances, courts have even found actions valid despite indications that they might be inconsistent with written directives that did exist. *See Coreas*, 526 F. App’x at 326 (applying the presumption of regularity even though the position of the official whose action was in question was not on a regulatory list of officials authorized to take the action, and the definition of that position and the source of that position’s authority was unclear); *Almy v. Sebelius*, 679 F.3d 297, 309 (4th Cir. 2012) (applying the presumption to reject an argument that an agency had issued a decision without input required by regulation even though the agency had not documented compliance with the requirement).

Here, no one questions that the District Director is a Department of Labor official. *See, e.g.*, D&O at 3, n.14. The District Director’s issuance of the determination letter is accordingly

an act performed by a federal government official to which the presumption of regularity applies. Broadgate could have rebutted the presumption, including the presumption that the District Director was authorized to issue the determination letter through a proper delegation, but it could have only done so through the production of clear evidence. As the ALJ observed, Broadgate not only failed to produce such clear evidence, it

made no effort whatsoever to prove any set of facts on the delegation of authority issue. If a superior tribunal disagrees with my assessment of whether [Broadgate] bears the burden of proof on the delegation argument, that tribunal should note my finding that Respondent has proven nothing on this point.

D&O at 22.

Because it was Broadgate's burden to produce clear evidence rebutting the presumption of regularity that attaches to the District Director's issuance of the determination letter, and because the ALJ correctly ruled Broadgate made no effort whatsoever to present any such rebuttal evidence, the Administrator had (and has) no obligation to produce any evidence demonstrating the District Director's authority to issue the determination letter.

Nevertheless, record evidence supports the District Director's authority to issue the determination letter. The record demonstrates that District Directors are "responsible for all enforcement activity in the assigned district office." D&O at 30. A district office's primary enforcement activity is to conduct and complete investigations with the H-1B investigative process culminating in the issuance of a determination letter. The responsibility over *all* of an office's enforcement activities includes the authority to issue an office's ultimate enforcement document. Moreover, the record shows that approximately five years prior to issuance of the December 28, 2018 determination letter at issue here, the very same District Director (Ms. Mitchell) had issued a separate H-1B determination letter to Broadgate. *See* Joint Exhibits 10 &

16. Although it is not necessary for the Administrator to present any evidence to prove the District Director's authority to issue the determination letter, the evidence showing that District Directors are responsible for all enforcement activity within their office and that this particular District Director has exercised this responsibility through issuance of determination letters reinforces the reasonableness of applying the presumption of regularity here. *Cf. Frankl v. HTH Corp.*, 650 F.3d 1334, 1353 (9th Cir. 2011) (concluding that the "longstanding practice" of a specific agency official exercising a particular authority was "strongly supportive of that practice's validity").⁴

The ALJ opined that the presumption of regularity applies solely in Article III courts and not to "ALJ [proceedings] in the Executive Branch," D&O at 37, thereby excusing Broadgate's total failure to present any evidence to support its argument that the District Director lacked delegated authority. The ALJ cited no authority to support the proposition that the presumption applies solely in Article III courts, which is inconsistent with myriad decisions issued by administrative adjudicators within the Department. *See, e.g., In re Yongsoo, Inc.* 2017 WL 2315950, at *3 n.3 (BALCA Mar. 31, 2017) (applying the presumption and noting that it "allows courts to presume that what appears regular is regular, which shifts the burden to the attacker to show the contrary"); *In re Aldana & Associates*, 2016 WL 5887642, at *2 n.3 (BALCA Oct. 6, 2016) (same); *Secretary of Labor v. Cambria Contracting, Inc.*, 2012 WL 681223, at *34 (ALJ Bober, Jan. 11, 2012); *OFCCP v. Safeco Insurance Co.*, 1984 WL 908487 (ALJ Lasky, May 25,

⁴ The Ninth Circuit additionally stated that "[t]o conclude that the [agency official] could not exercise such authority would be to hold decades of unchallenged agency practice unlawful – a practice, moreover, by which courts have acquiesced thousands of times over by granting petitions for enforcement." *Frankl*, 650 F.3d at 1353. District Directors have regularly issued H-1B determination letters for decades – a practice in which both this Board and federal courts have long acquiesced. As in *Frankl*, this longstanding practice "reinforce[s]" the legitimacy of the District Director's issuance of determination letters. *Id.*

1984); *Secretary of Labor v. Newport News Shipbuilding & Drydock Co.*, 1980 WL 10708, at *8 (OSHRC Nov. 28, 1980) (recognizing that the presumption has been applied to instances in which a party challenges whether an official has been properly delegated authority); *cf. Holmes v. Dept. of the Air Force*, 2013 WL 9680720, at *3 (MSPB Aug. 22, 2013). In any event, the proposition is unsound because the presumption's application is not contingent on the forum in which the federal government is litigating a dispute. Rather, it applies "whenever an official has acted," *Borg-Warner Corp.*, 660 F.2d at 330, as the District Director did here when she issued the determination letter.

In an attempt to distinguish application of the presumption by Article III judges from its application by Department ALJs, the ALJ suggests that his employment of the presumption would be inconsistent with his obligation "to make a record" and to "evaluate th[e] issue on the merits." D&O at 36-37. This distinction fails to withstand scrutiny because federal appellate judges, as the various cases identified above demonstrate, employ the presumption of regularity to issue merits rulings in matters in which they are presiding over a record. *See, e.g., Chemical Found.*, 272 U.S. at 14-15 (applying the presumption to a matter in which a district court, like the ALJ here, had presided over the creation of a record). And district court judges, like the ALJ here, likewise preside over a record on which they must rely to issue merits rulings, and in doing so such judges regularly employ presumptions, including the presumption of regularity, to issue those merits rulings. *See, e.g., Miley v. Lew*, 42 F. Supp. 3d 165, 171-74 (D.D.C. 2014) (applying presumption of regularity); *Habitat Education Center v. U.S. Forest Service*, 2009 WL 1351156 at *5-8 (E.D. Wis. May 12, 2009) (same). Given the regularity with which federal courts employ presumptions to issue merits rulings, the distinction the ALJ attempted to draw is incorrect.

The ALJ additionally stated that *American Vanguard v. Jackson*, 803 F. Supp. 2d 8 (D.D.C. 2011), assisted his “review of the evidence and argument in the case.” D&O at 20. However, that decision is inapposite. In *American Vanguard*, EPA contended that an internal restructuring authorized a specific official to issue a particular agency order despite the existence of a written memorandum explicitly authorizing a different official to issue such orders; the court concluded that EPA “must adhere to its earlier determination.” 803 F.Supp. 2d at 13-16. There is no indication that the district court even considered the presumption of regularity in *American Vanguard* to determine whether the government official was authorized to act. Because here there is no “earlier determination” specifying which WHD official may issue H-1B determination letters, and because the presumption of regularity applies, the ALJ’s reliance on *American Vanguard* is misplaced.

The ALJ’s apparent legal conclusion that the Administrator’s Post-Trial Brief “abandoned” her argument that Broadgate has the burden to prove that Ms. Mitchell lacked authority to issue the determination letter constitutes plain legal error. D&O at 22, 42, ¶48. The Administrator argued in her *Supplemental Pre-Hearing Statement* that the presumption of regularity applies and that it is Broadgate’s burden to produce clear evidence in order to rebut it. See ¶3. Nothing in the Post-Trial Brief abandons this position. Rather, the Post-Trial Brief, consistent with the Pre-Hearing Statement, argues that the presumption of regularity applies, *see Administrator’s Post-Trial Brief* at 26, which is alone sufficient to render the ALJ’s abandonment conclusion plain legal error because it is the presumption that places the burden on Broadgate to prove that Ms. Mitchell lacked authority. However, the Administrator did not merely state that the presumption applies, she also specifically argued—in the very next sentence—that Broadgate’s challenge to the District Director’s authority to issue the

determination letter is unavailing because *the company* “has not pointed to any factual basis” to support its “speculation” that the District Director lacked authority. *Id.* at 26-27. That is, the Post-Trial Brief expressly argued that the company had the burden to point to facts in order to overcome the presumption and failed to do so. The Board should accordingly reject the ALJ’s incorrect conclusion that the Administrator abandoned her argument that Broadgate has the burden to prove that Ms. Mitchell lacked authority to issue the determination letter.

In sum, because the ALJ erred in failing to apply the presumption of regularity and Broadgate produced no evidence to rebut the presumption, the Board should reverse the ALJ’s ruling that the District Director lacked authority to issue the determination letter.⁵

2. The District Director is an Authorized Representative Designated by the Administrator to Perform the Functions That the Administrator Was Delegated to Perform by the Secretary.

In addition to the overarching presumption of regularity vis-à-vis the actions of government officials (including the delegation of authority to those officials), which Broadgate failed to rebut, the H-1B regulations also demonstrate the legitimacy of the District Director’s issuance of the determination letter.

As noted above and as is undisputed, the Secretary delegated his authority to administer and enforce the requirements of the H-1B program to the WHD Administrator. *See* Sec’y’s

⁵ In the matter the ARB consolidated with this case, *see Administrator v. Spate Business Solutions*, ARB Case No. 2019-0083, the ALJ relied heavily on the presumption of regularity to show that WHD acted with valid authority. *See Spate Business Solutions*, 2019-LCA-00002, at *23 (Aug. 12, 2019). That decision identifies the practical reason for such reliance by referring to the Administrator’s authority to conduct investigations under H-1B, as set out at 20 C.F.R. 655.800(b), and what that authority entails: “If these [entering and inspecting workplaces and records, questioning individuals, and gathering necessary information] were all requirements that the Administrator had to show in its case-in-chief, this court [the ALJ] would be faced with reviewing and second guessing almost every aspect of a WHD investigation in H-1B matters. There is no good reason to believe that is required.” *Id.*

Order. And as also noted above, the “Administrator shall perform all the Secretary’s investigative and enforcement functions under . . . 8 U.S.C. 1182(n)” 20 C.F.R. 655.800(a). Crucially, the regulations define the “Administrator” to mean not only the Administrator herself, but also “such authorized representatives as may be designated to perform any of the functions of the Administrator under subpart H or I of this part [the regulatory H-1B provisions].” 20 C.F.R. 655.715 (Definitions). Defining Administrator to include her authorized subordinates conforms with the practical reality, long-recognized under federal law, that the devolution of an agency head’s duties to subordinate personnel is necessary given the considerable responsibilities agency heads bear. *See Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 122-23 (1947) (noting with respect to the Administrator of another agency granted authority by Congress that “[w]e would hesitate to conclude that all the various functions granted the Administrator need be performed personally by him or under his personal direction”).

Contrary to the conclusion of the ALJ,⁶ the District Director, consistent with the definitional language at 20 C.F.R. 655.715, is an authorized representative of the Administrator who was designated to perform some of her functions. *See, e.g.*, American Heritage Dictionary of the English Language (Fifth Edition), Houghton Mifflin Harcourt Publishing Co. (2019) (defining the verb “designate” to mean “[t]o select and set aside for a duty, office, or purpose”). The record evidence demonstrates that the District Director is a “subordinate” of the Administrator, *see* D&O at 40 ¶36, selected to perform duties that the Administrator has “approved.” AX 2. These duties include complete responsibility for WHD enforcement matters in her district office. *See* D&O at 30 (quoting the District Director’s responsibilities in her

⁶ The ALJ “construe[d] the phrase ‘as may be designated’ as used in 20 C.F.R. 655.715 to mean one who possesses a grant of delegated or re-delegated authority.” D&O at 27 (internal quotation marks omitted).

Position Description (“PD”) as including “responsib[ility] for all enforcement activity in the assigned district office”); D&O at 32 (identifying WHD Field Operations Handbook (“FOH”) Chapter 51a00, which provides that District Directors and Assistant District Directors are responsible to schedule the investigations WHD investigators conduct and decide whether to proceed with certain investigations); *id.* (identifying FOH Chapter 71c01, which authorizes a District Director to determine whether the scope of an H-1B investigation should include employer wage and benefit compliance with respect to all H-1B workers). The evidence the Administrator submitted showing that the District Director has total responsibility for enforcement matters in her district office demonstrates that the Administrator has, at a minimum, designated the District Director to issue H-1B determination letters. *See, e.g.*, Administrator Exhibit 1 & 2.⁷

3. Because the ALJ Found That the Administrator Proved by a Preponderance of the Evidence the Underlying Willful Violations After a Hearing, and Because Broadgate Did Not Offer Any Evidence to Refute That Finding, the ARB, in an Exercise of its De Novo Review, Should Issue a Remedial Order Debarring Broadgate.

If the Board concludes that the ALJ erred when he ruled that the District Director lacked authority to issue the determination letter, it should adopt the ALJ’s unrefuted finding that, based on a preponderance of the evidence, Broadgate committed 14 willful violations with respect to its obligation to provide notice of the LCA’s filing, *see* D&O ¶29, and debar Broadgate for two years pursuant to 8 U.S.C. 1182(n)(2)(C)(ii)(II) and 20 C.F.R. 655.810(d)(2). A two-year debarment is the minimum required remedy when an employer commits the qualifying willful

⁷ The ALJ correctly notes that a designee of the Secretary of Labor may issue a final agency decision under a written delegation of authority. D&O at 33 (citing 29 C.F.R. 2.8). To the extent that section 2.8 requires a written delegation of authority to Ms. Mitchell to issue the determination letter, her designation as an authorized representative pursuant to the regulatory definition of Administrator in section 655.715 satisfies section 2.8’s written delegation requirement.

violations that the ALJ found Broadgate committed. *See* 8 U.S.C. 1182(n)(2)(C)(ii)(II) and 20 C.F.R. 655.810(d)(2). Issuing an order adopting the ALJ’s findings of 14 willful violations is appropriate because the parties have already conducted a hearing on the posting violations at which Broadgate had the opportunity to present evidence on the issue and failed to refute that there was a preponderance of evidence showing that such violations were committed. The record supports the ALJ’s finding of willfulness with respect to the failure to post notice of the LCAs at the actual worksite of the H-1B worker because it demonstrates that both WHD and the company’s attorneys had previously informed the company of this obligation. *See Stipulated Facts*, ¶15; JX 7, May 17, 2013 Letter to Broadgate from Counsel (“[I]t is mandatory that you post an LCA notice at the actual work location where the H-1B beneficiary will work.”). The Board should accordingly impose the two-year debarment remedy. *See In re Administrator v. Sirsai*, 2015 WL 609689 (ARB Jan. 28, 2015).⁸

⁸ The Administrator assessed \$57,904 in CMPs for Broadgate’s 14 willful failures to post notice of the LCA at the H-1B worker’s actual worksite. The Administrator believes that the record shows that the assessment of a \$4,136 CMP for each willful violation constitutes a reasonable implementation of the non-exhaustive factors that the Administrator must apply when evaluating an appropriate CMP amount (not to exceed \$7,520 per violation). *See* 20 C.F.R. 655.810(c). However, the ALJ did not engage in fact-finding as to the appropriate amount of the CMP. Because the Administrator understands that it is appropriate for the ALJ, as the initial fact-finder, to make a determination related to the CMPs, the Administrator respectfully requests that the Board remand the CMP issue to the ALJ.

CONCLUSION

For the foregoing reasons, the Administrator requests that the Board reverse the ALJ's decision concluding that the WHD District Director did not have the authority to issue the H-1B determination letter in this case, and issue an order of debarment against Broadgate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2019, I served the foregoing Administrator's Opening

Brief on the following by sending a copy via first-class mail to:

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