



**In the Matter of:**

**ROBERT A. SMITH,**

**ARB CASE NO. 03-131**

**PETITIONER,**

**ALJ CASE NO. 2003-LCA-2**

**v.**

**DATE: July 31, 2003**

**SUN MICROSYSTEMS, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Petitioner:*

**Robert A. Smith, *pro se*, Evergreen, Colorado**

*For the Respondent:*

**Roxana C. Bacon, Esq.; Diane M. Dear, Esq., *Little Mendelson Bacon & Dear PLLC*,  
Phoenix, Arizona**

### **FINAL ORDER OF DISMISSAL**

On February 19, 2003, a Labor Department Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) pursuant to the enforcement provisions of the Immigration and Nationality Act, 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b) and 1182(n) (West 1999) (“H-1B provisions”) and implementing regulations at 20 C.F.R. Part 655, Subparts H and I (2003). *Santiglia v. Sun Microsystems, Inc.*, ALJ No. 2003-LCA-2 (ALJ Feb. 19, 2003). The deadline for petitioning for review of the D. & O. was March 21, 2003. 20 C.F.R. § 655.845(a). We dismiss the instant petition for review as untimely.

### **BACKGROUND**

The Immigration and Nationality Act defines various classes of aliens who may enter the United States for prescribed periods of time and for prescribed purposes under the various types

of visas. 8 U.S.C.A. § 1101(a)(15). One class of aliens, known as “H-1B” workers, are allowed entry to the United States on a temporary basis to work in “specialty occupations.” *Id.* at § 1101(a)(15)(H)(i)(B); 20 C.F.R. § 655.700.

“Specialty occupation” means an occupation that requires theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor’s degree or higher in the specific speciality. 8 U.S.C.A. § 1184(i); 20 C.F.R. § 655.715. The Immigration and Nationalization Service (INS) identifies and defines the occupations covered by the H-1B category and determines an alien’s qualifications for such occupations. The Labor Department administers and enforces the labor condition applications relating to the employment. 20 C.F.R. § 655.705; 59 Fed. Reg. 65,646 (Dec. 20, 1994).

To hire an H-1B worker, the employer must file a Labor Condition Application (LCA) with the Employment and Training Administration of the United States Department of Labor. In the LCA, the employer must make certain representations and attestations regarding its responsibilities, including a representation that the alien will be paid at the actual wage level paid to all other individuals with similar experience and qualifications for the employment in question or the prevailing wage for the occupational classification in the area of employment. 8 U.S.C.A. § 1182(n).

The attestation and representation relevant to this proceeding includes a requirement that the employer certify that he has provided notice of the filing of the LCA to his employees by physically posting a copy of the LCA in a conspicuous location at the place of employment in the occupational classification for which the H-1B workers are sought. The employer is also required to make available for public examination at the employer’s principal place of business, within one working day after the LCA is filed, a copy of the application, along with any necessary supporting documentation. 8 U.S.C.A. § 1182(n); 20 C.F.R. § 655.705(c). The LCA includes information about the job title, the employer’s name, the area of intended employment, the dates of intended employment, the prevailing wage, actual wage or a wage range for the position, the source of the employer’s wage information, and the number of positions requested by the LCA. D. & O. at 4.

Sun Microsystems, Inc., provides products, services and support solutions for building and maintaining network computing environments. 10-K Auditor’s Report, June 30, 2002. Sun is a multi-national employer with over 37,000 employees worldwide. D. & O. at 5. It employs H-1B workers in various jobs. Sun employed the complainant, Guy Santiglia, as an IR technologist in the IT Department responsible for providing internal support for computer users on Sun’s Santa Clara Campus. *Id.* at 6. Sun laid Santiglia off on November 5, 2001. *Id.*

Santiglia, after his lay off, sought to determine whether Sun was laying off American workers and replacing them with H-1B workers who, he believed, could be paid less than American workers. In his efforts to make this determination, Santiglia repeatedly examined Sun’s public LCA files. Eventually, Santiglia became convinced that Sun deliberately failed to comply with H-1B posting and access requirements. *Id.*

As a result, Santiglia filed a complaint against Sun with the Labor Department's Wage & Hour Administrator for failure to afford Santiglia proper access to public documents and failure to post certain LCAs in compliance with H-1B regulations. *Id.* at 1. After an investigation, the Administrator concluded that Sun did not comply with all procedural requirements but that Sun's conduct was not willful. *Id.* at 2. Santiglia invoked his right to an administrative law hearing on the correctness of the Administrator's determination. *Id.*

At the hearing Santiglia sought to introduce print-outs of e-mail messages from Robert A. Smith. Tr. 241 – 244.<sup>1</sup> The ALJ excluded the messages as exhibits because they were not authenticated. *Id.*

On February 19, 2003, the ALJ issued a Decision and Order in which he ruled that Sun failed to comply with some procedural requirements for posting and public access but that the violations were not willful. *Santiglia*, ALJ No. 2003-LCA-2.

By facsimile to this Board dated June 18, 2003, Robert A. Smith advised that he would be filing a brief to object to the *Santiglia* D. & O. Subsequently, Smith filed with the Board a Statement of Interest in which he explained that he has an interest in Santiglia's case because (a) Smith had also been employed by and laid off by Sun, (2) Smith believes the ALJ erred in disallowing Smith's e-mails as evidence. We construe Smith's June 18, 2003 fax as a petition for review of the D. & O.

## DISCUSSION

Section 655.845(a), 20 C.F.R., provides that interested parties may challenge an ALJ H-1B Decision and Order by filing a petition for review within 30 calendar days of the date of the ALJ decision:

(a) The Administrator or any interested party desiring review of the decision and order of an administrative law judge, including judicial review, shall petition the Department's Administrative Review Board (Board) to review the decision and order. To be effective, such petition shall be received by the Board within 30 calendar days of the date of the decision and order.

20 C.F.R. § 655.845(a).

Pursuant to 20 C.F.R. § 655.845(a), the last day for filing a petition for review of the ALJ decision below was March 21, 2003. Smith's petition was out of time. Therefore, Smith's

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<sup>1</sup> References to the transcript of the hearing below are indicated by "Tr."

petition for review is **DISMISSED** as untimely filed.<sup>2</sup> *See also Joshi v. Pegasus*, ARB No. 03-034, ALJ No. 01-LCA-029 (ARB July 29, 2003) (individuals who did not participate as parties to the administrative law hearing are not “interested parties” within the meaning of 20 C.F.R. § 655.845(a) for purposes of appeal).

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

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<sup>2</sup> On April 14, 2003, the Board issued a Notice of Intention to Review and Order Establishing Briefing Schedule (“Briefing Order”). The Briefing Order stated, *inter alia*, that “[t]he Complainant and other parties and interested persons aggrieved by the ALJ’s Decision and Order, shall file a brief in support of the Petition for Review . . . on or before May 28, 2003.” A subsequent Briefing Order extending the time from May 28 to June 27 also referred to “other parties and interested persons.” Order Granting Extension of Time and Amending Briefing Schedule, ARB No. 03-076, issued May 27, 2003. The Orders were served on the parties below, the Administrator, and their counsels.

The Briefing Orders may seem to imply that the Board authorized entities other than the named parties below and the Administrator to file briefs in Santiglia’s appeal. Any such implication was unintended. As explained above, § 655.845(a) limits the individuals entitled to petition for review to the named parties below and to the Administrator. The briefing order applied only to parties within the meaning of § 655.845(a).