



Issue Date: 29 July 2016

Case No.: 2013-LCA-00039

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,
Prosecuting Party,

v.

ME GLOBAL, INC.,
Respondent.

DECISION AND ORDER GRANTING
ADMINISTRATOR'S MOTION FOR SUMMARY DECISION AND
DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

This matter arises under the H-1B non-immigrant worker visa provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1101, *et seq.* (the "Act"), and the implementing regulations at 20 C.F.R. Part 655, Subparts H and I. ME Global Inc. ("Respondent") challenges the Determination Letter issued by the Administrator, Wage and Hour Division, U.S. Department of Labor ("Administrator"; "Department"), on September 10, 2013. In the Determination Letter, the Administrator determined that: (1) Respondent failed to pay Petar Peric ("Mr. Peric"), an H-1B non-immigrant worker, wages as required, in violation of 20 C.F.R. § 655.731; (2) failed to provide notice of filing the Labor Condition Application ("LCA") in this matter, in violation of 20 C.F.R. § 655.73; (3) failed to maintain documentation, in violation of 20 C.F.R. §§ 655.731(b), 655.738(e), 655.739(i), and 655.760(c); and (4) failed to comply with the provisions of 20 C.F.R. Part 655, Subparts H and I, in violation of 20 C.F.R. § 655.731(c)(7). The Administrator ordered Respondent to pay back wages in the amount of \$182,943.65, but did not impose any civil money penalties as a result of any of the four violations; the Administrator did, however, order Respondent to comply with the applicable regulations in the future concerning all four violations.

On September 24, 2013, Respondent requested a hearing before an administrative law judge. In its request for a hearing, Respondent contested the Administrator's finding that it failed to pay wages as required to Mr. Peric and was required to pay \$182,943.65 in back wages. Respondent did not contest the other three violations listed in the Determination Letter.¹

¹ Because Respondent did not dispute the other three violations, the Administrator's Determination concerning those violations are final and are not before me. 20 C.F.R. § 655.820(c)(3) (party requesting hearing must give specific

Both parties have filed cross-motions for summary decision addressing whether or not Respondent failed to pay Mr. Peric wages as required and is required to pay \$182,943.65 in back wages. As explained below, Respondent's arguments that this proceeding is time-barred are unavailing, and there are no disputed issues of material fact bearing on whether Respondent failed to pay Mr. Peric wages as required and is required to pay back wages in the amount found by the Administrator. Accordingly, the Administrator's Motion for Summary Decision² ("Administrator's Motion") is GRANTED and Respondent's Motion for Summary Decision ("Respondent's Motion") is DENIED.³

Statutory and Regulatory Framework

The H-1B visa program permits employers to temporarily employ non-immigrants to fill specialized jobs in the United States. The Act requires that an employer pay an H-1B worker the higher of its actual wage or the locally prevailing wage. Under the Act, an employer seeking to hire an alien in a specialty occupation on an H-1B visa must receive permission from the U.S. Department of Labor (the "Department") before the alien may obtain an H-1B visa. 8 U.S.C. § 1184(i)(1). To receive permission from the Department, the Act requires an employer seeking permission to employ an H-1B worker to submit an LCA to the Department. *See* 8 U.S.C. § 1182(n)(1).

The regulations specify how the H-1B worker must be paid. Under 20 C.F.R. § 655.731(c)(1), an employer must pay wages to the H-1B worker "cash in hand, free and clear, when due." The regulations further specify that H-1B workers must be paid no less often than monthly. 20 C.F.R. § 655.731(c)(4). However, if the H-1B worker voluntarily becomes non-productive, then the employer is not required to pay wages. The regulations continue:

If an H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience . . . or render the non-immigrant unable to work . . . then the employer shall not be obligated to pay the required wage rate during that period Payment need not be made if there has been a *bona fide* termination of the employment relationship. DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(c)).

reasons it believes administrator's determination is wrong); 20 C.F.R. § 655.815(c)(3) (in absence of timely request for hearing, administrator's determination becomes final). Consistent with my understanding that the other three violations are not before me, neither party's filings have addressed them. Administrator's Motion, at 2 n. 1 (acknowledging the other three violations and noting that Respondent has not contested them).

² I recognize the Administrator has styled this document "Administrator's Motion for Summary Judgment." However, consistent with practice before the Office of Administrative Law Judges, I will refer to it as a motion for summary decision.

³ Each party has opposed the other's motion for summary decision. Specifically, Respondent filed a Response to Administrator's Summary Decision Brief ("Respondent's Response") and the Administrator filed a Response to Respondent's Motion for Summary Decision ("Administrator's Response").

20 C.F.R. § 655.731(c)(7)(ii).

If the Administrator finds that an employer has violated its obligation to pay wages to the H-1B worker, the Administrator may conduct an investigation with respect to suspected violations. 20 C.F.R. § 655.50. The Administrator may then issue a Determination Letter citing violations, requiring payment of wages, and imposing fines. 20 C.F.R. § 655.70. If a party disagrees with the Determination Letter, that party may appeal to the Office of Administrative Law Judges.⁴

Summary Decision Standard

A party is entitled to summary decision if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there are no genuine issues as to any material fact and the party is entitled to judgment as a matter of law. 29 C.F.R. § 18.72(a);⁵ Fed. R. Civ. P. Rule 56. The moving party has the initial burden of demonstrating that the non-movant cannot make a showing sufficient to establish an essential element of his case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 325 (1986). The burden then shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). At this stage, the non-movant may not rest upon mere allegations, speculation, or denials in his pleadings but must set forth specific facts as to each issue as to which he would bear the ultimate burden of proof. 29 C.F.R. § 18.72(c). If the non-movant fails sufficiently to show an essential element of his case, there can be no genuine issue as to any material fact; a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 322-23. All evidence and reasonable inferences are considered in the light most favorable to the non-movant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

Findings of Fact

The following facts are undisputed.

In January 2007, Respondent hired Mr. Peric, a Canadian citizen, as a metallurgical engineer – he worked under a TN visa at the time. Administrator's Brief in Support of Motion for Summary Judgment ("Administrator's Brief"), at 3; Administrator's Motion, at Ex. C and D; Respondent's Memorandum in Support of Respondent's Motion for Summary Decision ("Respondent's Brief") at 2. In March 2008, Respondent applied for H-1B status for Mr. Peric, and submitted an LCA, which was certified for for the period from September 21, 2008, to

⁴ Parties may request a hearing under two circumstances. First, the complainant, or any other interested party, may request a hearing where the Administrator determines, after investigation, that there is no basis for finding that an employer has committed violations of the Act. Second, the employer, or any other interested party, may request a hearing where the Administrator determines, after investigation, that the employer has committed violations of the Act. 20 C.F.R. § 655.820(b). An "interested party" is defined as "a person or entity who or which may be affected by the actions of an H-1B employer or by the outcome of a particular investigation and includes any person, organization, or entity who or which has notified the Department of his/her/its interest in the Administrator's determination." 20 C.F.R. § 655.715.

⁵ At the time the parties' motions for summary decision were filed, the relevant rule was 29 C.F.R. § 18.40. The substance of the two rules is the same.

September 21, 2011. Administrator's Brief, at 5; Administrator's Motion, at Ex. E; Respondent's Motion, at 2. Mr. Peric's annual salary initially was \$70,000.00, but on February 4, 2008, it was raised to \$71,750.00. Administrator's Brief, at 5; Administrator's Motion, at Ex. G; Respondent's Brief, at 4. On March 22, 2008, Respondent's Vice President, Human Resources twice signed an "H Classification Supplement to Form I-129" concerning the H-1B application for Mr. Peric: above one signature was printed, "[b]y filing this petition, I agree to the terms of the labor condition application for the duration of the alien's authorized period of stay for H-1B employment[;]" above the other signature was printed, "[a]s an authorized official of the employer, I certify that the employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized stay." Administrator's Motion, at Ex. D.

Mr. Peric worked for Respondent from January 2007 to November 2008; Respondent terminated Mr. Peric's employment effective November 25, 2008, and continued to pay him wages through November 30, 2008. Administrator's Brief, at 5; Administrator's Motion, at Ex. C; Respondent's Brief, at 3; Affidavit of Landon Johns in Support of Respondent's Motion for Summary Decision ("Johns Declaration"), at Ex. A-C. Respondent's employees verbally notified Mr. Peric that he was terminated. Administrator's Motion, at Ex. C (in discovery, Respondent admitted "that the communications ... by which Respondent notified [Mr.] Peric that his employment relationship with Respondent was terminated were verbal"); Administrator's Motion, at Ex. L.⁶

Respondent did not pay Mr. Peric any wages after December 1, 2008. Administrator's Motion, Exhibit C (in discovery, Respondent admitted that it "did not pay ... [Mr.] Peric wages after December 1, 2008 because [Mr.] Peric's employment relationship with Respondent ended."). On December 9, 2008, Mr. Peric filed a claim for unemployment benefits with the Arizona Unemployment Insurance Program. Respondent's Brief, at 4; Johns Declaration, at Ex. C.

Before September 2009, Respondent did not provide Mr. Peric a copy of the LCA covering the period from September 21, 2008, to September 21, 2011. Administrator's Motion, at Ex. C (in discovery, Respondent admitted that "[p]rior to September of 2009, ... [it] did not provide ... [Mr.] Peric a copy of the applicable LCA....").

On June 15, 2011, Mr. Peric returned to Canada. Administrator's Brief, at 6; Administrator's Motion, at Ex. I; Respondent's Brief, at 4; Affidavit of Richard W. Pins in Support of Respondent's Motion for Summary Decision ("Pins Declaration"), at Ex. B. Respondent did not offer to pay Mr. Peric's transportation home. Administrator's Brief, at 6; Administrator's Motion, at Ex. C (in discovery, Respondent admitted that "[p]rior to June 15, 2011, ... [it] did not offer ... [Mr.] Peric payment for transportation home).

⁶ It is undisputed that on November 24, 2008: (1) Mr. Peric's supervisor addressed unsafe conduct by Mr. Peric; (2) Mr. Peric responded that if he were not doing his job correctly he would resign; (3) Mr. Peric was then told to report to Human Resources the next day; and (4) Mr. Peric then stated he would not resign and Respondent would have to fire him. Johns Declaration, at Ex. A. It is also undisputed that on November 25, 2008, Mr. Peric met with Human Resources and stated he would not resign and the company would have to fire him, at which point Respondent's Human Resources Manager told Mr. Peric "his services were no longer needed ... and that he would be paid through November 30, 2008, at which time he would be released from the company." *Id.*

Before Mr. Peric returned home to Canada, Respondent did not notify U.S. Citizenship and Immigration Services (“USCIS”) that its employment of Mr. Peric was terminated. Administrator’s Motion, at Exhibit C (in discovery, Respondent admitted that “[p]rior to June 15, 2011, ... [it] did not notify USCIS that its employment relationship with ... [Mr.] Peric was terminated”). Nor did Respondent file a request with USCIS to have the Petition for Non-Immigrant Workers concerning Mr. Peric revoked, canceled, or withdrawn. Administrator’s Brief, at 6; Administrator’s Motion, Ex. C. *See also* Respondent’s Response, at 5: “the evidence supporting the Administrator’s position on the merits is that ... [Respondent] did not immediately notify DHS and did not pay for Mr. Peric’s travel back to Canada.”

On or about June 28, 2010, Mr. Peric filed a complaint against Respondent with the Wage and Hour Division (“WHD”). Administrator’s Brief, at 6; Administrator’s Motion, at Exhibit J; Respondent’s Brief, at 4; Pins Declaration, at Ex. D. On or about July 21, 2010, WHD responded to Mr. Peric’s letter stating, in part, that it “ha[d] determined that there is no reasonable cause to conduct an investigation based on the information you [Mr. Peric] have provided because you first contacted DOL approximately 18 months following your termination[.]” and “[y]our complaint falls outside the 12 month window and WHD is therefore unable to pursue this matter.” Pins Declaration, at Ex. E.

On or about July 26, 2010, Mr. Peric wrote WHD again with additional information concerning his complaint. Respondent’s Brief, at 5; Pins Declaration, at Ex. F. On or about August 10, 2010, WHD responded, stating that it “can only conduct an investigation if a complaint is received within 12 months of the alleged violation[.]” that his “records do not indicate that ... [he] registered a complaint within we months of the termination[.]” and “WHD is unable to pursue this matter.” Respondent’s Brief, at 5; Pins Declaration, at Ex. G.

On or about June 9, 2011, Mr. Peric wrote WHD again, recounting his efforts to contact WHD and again asking for action on his complaint. Respondent’s Brief, at 5; Pins Declaration, at Ex.H. There is no record of WHD having responded to this letter.

On or about September 1 or 2, 2011, Mr. Peric called WHD, and WHD generated a Complaint Information Form stating he had tried to contact them several times in 2009, 2010, and 2011. Respondent’s Brief, at 6; Pins Declaration, Ex. I.

On or about January 23, 2013, the Administrator accepted Mr. Peric’s complaint dated June 28, 2010, and determined that the complaint presented reasonable cause to conduct an investigation. Respondent’s Brief, at 6; Pins Declaration, at Exhibit J (in discovery, the Administrator stated that the complaint “was accepted for filing on or about January 23, 2013” and similarly stated the reasonable cause determination was made on or about that date). The WHD investigator assigned to this matter began her investigation in March 2013. Administrator’s Motion, at Ex. K. On or about April 18, 2013, WHD notified Respondent that it would be investigated “to determine compliance with the H-1B Labor Condition Application (LCA) provisions of the Immigration and Nationality Act (INA).” Respondent’s Brief, at 6; Pins Declaration, at Ex. N. This was the first time that Respondent was notified that it would be investigated concerning its H-1B compliance. Respondent’s Brief, at 6; Pins Declaration, at 3.

Following an investigation, on September 10, 2013, the Administrator issued a determination finding that: (1) Respondent failed to pay Mr. Peric wages as required, in violation of 20 C.F.R. § 655.731; (2) failed to provide notice of filing the LCA in this matter, in violation of 20 C.F.R. § 655.73; (3) failed to maintain documentation, in violation of 20 C.F.R. §§ 655.731(b), 655.738(c), 655.739(i), and 655.760(c); and (4) failed to comply with the provisions of 20 C.F.R. Part 655, Subparts H and I, in violation of 20 C.F.R. § 655.731(c)(7). The Administrator ordered Respondent to pay back wages in the amount of \$182,943.65, but did not impose any civil money penalties as a result of the violations; the Administrator did, however, order Respondent to comply with the applicable regulations in the future. Administrator's Brief, at 7; Administrator's Motion, at Ex. A; Respondent's Brief, at 7; Pins Declaration, at Exhibit P.

DISCUSSION

The Complaint and the Administrator's Determination Are Not Time-Barred

Respondent argues that both the complaint and the Administrator's Determination are time-barred. First, Respondent argues that the complaint is barred by the 12 month limitations period at 20 C.F.R. § 655.806(a)(5). Respondent's Brief, at 10-12. Second, Respondent argues that the complaint is barred because WHD did not accept it for filing within ten days of receiving it, as is required by 20 C.F.R. § 655.806(a)(3). Respondent's Brief, at 12-15. Third, Respondent argues that the Administrator is barred from acting on the complaint pursuant to *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Respondent's Brief, at 15-17. Fourth, Respondent argues that the Administrator is barred from acting on the complaint by the doctrine of laches. Respondent's Brief, at 17-19. As outlined below, each of these arguments fails and thus the Complaint is not time-barred.

The 12 Month Limitations Period Does Not Bar the Complaint

The 12 month limitations period at 20 C.F.R. § 655.806(a)(5) does not bar the complaint because:

[t]he limitations period commences on the **latest** date on which the employer fails to perform an action or fulfill a condition specified in the LCA.

Thus, the limitations period for a benching complaint does not begin to run as long as the employer maintains an employment relationship with a nonimmigrant it has chosen to place in nonproductive status. ... In other words, the express terms of the regulation make a benching violation a "continuing violation" that remains actionable for the duration of the employment relationship as stipulated in the LCA.

Gupta filed his September 2003 complaint before the term of employment stipulated in the LCA – October 15, 2003 – had expired. Therefore, his complaint was timely filed.

Gupta v. Jain Software Consulting, Inc., No. 05-008, ALJ No. 2004-LCA-39, slip op. at 5 (ARB Mar. 30, 2007) (emphasis in original; citation and quote omitted).⁷

As Mr. Peric told Respondent that he would not resign and they would have to fire him, and as Respondent then fired Mr. Peric, the conclusion is inescapable that this case involves a benching violation. Simply put, Respondent “chose[] to place [Mr. Peric] in nonproductive status.” It is thus equally inescapable that this case involves a “continuing violation” and a complaint is timely under 20 C.F.R. § 655.806(a)(5) as long as it was filed within one year of when Mr. Peric had left the country. This is because after Mr. Peric returned to Canada on June 15, 2011, his nonproductive status (*i.e.*, his unavailability to work) was no longer the result of Respondent’s choice to fire him – rather, it was the result of his choice to return to Canada. The limitations period for the continuing violation thus expired on June 15, 2012. Mr. Peric’s June 28, 2010 complaint is timely under 20 C.F.R. § 655.806(a)(5).⁸

Respondent cites *Jain v. Infobahn Technologies*, No. 08-077, ALJ No. 2008-LCA-008, slip op. at 12 (ARB Oct. 30, 2009) for the proposition that the limitations period established by 20 C.F.R. § 655.806(a)(5) “begins to run when the violation occurred.” Respondent’s Brief, at 10. *Jain*, which involved allegations that an employer failed to pay an employee for a 20 day period approximately 11 months before he resigned his employment and underpaid him for approximately three months ending approximately seven months before he resigned, is inapposite because, unlike *Gupta*, it did not involve a continuing violation. Indeed, the *Jain* decision quotes *Gupta* with a footnote indicating that its analysis should be compared to that in *Gupta*: the limitations period “begins to run when the violation occurred, not when the ‘employee was last employed under an H-1B visa.’” *Jain*, slip op. at 12 (“cf.” footnote citing *Gupta* omitted).⁹

The Ten Day Deadline Does Not Prevent the Administrator From Acting on the Complaint

Within ten days of receiving a complaint, the Administrator shall determine whether an investigation is warranted. 20 C.F.R. § 655.806(a)(2). If the Administrator so determines, “the complaint shall be accepted for filing...” 20 C.F.R. § 655.806(a)(3). There is no dispute that the ten day deadline was not met in this case. Failure to meet the deadline however, does not prevent the Administrator from acting on the complaint.

⁷ “Benching” an H-1B employee is placing him “in a nonproductive status due to a decision by the employer (e.g., because of lack of assigned work), lack of a permit or license, or any other reason except as specified in [20 C.F.R. § 655.731(c)(7)(ii)].” 20 C.F.R. § 655.731(c)(7)(i); see *Gupta*, slip op. at 2.

⁸ Had Respondent effected a *bona fide* termination of the employment relationship, it would not have been required to pay Mr. Peric following that termination. 20 C.F.R. § 655.731(c)(7)(ii). As the *Gupta* decision implicitly recognized, a *bona fide* termination, if established, could provide a date the continuing violation ended. *Gupta*, slip op. at 5-6. As explained below, however, in this case there was no *bona fide* termination and thus no date earlier than June 15, 2011, that the continuing violation ended.

⁹ Unlike *Gupta*, *Jain* does not address the issue of whether a *bona fide* termination of the employment relationship had occurred. *Jain* thus sheds no light on whether the limitations period at 20 C.F.R. § 655.806(a)(5) applies to bar an action where there has not been a *bona fide* termination of the employment relationship.

In *Adm'r v. Integrated Informatics*, No. 08-127, ALJ No. 2007-LCA-026 (ARB Jan. 31, 2011), the Administrative Review Board (the "Board") found that the Administrator's failure to complete an investigation within the thirty day period set in 20 C.F.R. § 655.806(a)(3) did not "bar ... [the Administrator] from processing ... [the] complaint." *Id.*, slip op. at 6 (footnote citing *Cyberworld Enterprise Technologies, Inc. v. Napolitano*, 602 F.2d 189 (3rd Cir. 2010), *Adm'r v. Synergy Systems, Inc.*, No. 04-046, ALJ No. 2003-LCA-022 (ARB Jun. 30, 2006), and *Brock v. Pierce County*, 476 U.S. 253 (1986) omitted). The Board in that case upheld a determination that "the time limits for processing an INA complaint are directional and not jurisdictional...." *Id.*, slip op. at 5-6.

Respondent argues that the ten day deadline at 20 C.F.R. § 655.806(a)(2) should be treated differently than the thirty day deadline at 20 C.F.R. § 655.806(a)(3) because the former only requires that a complaint be filed while the latter requires that an investigation be conducted, and because the former does not allow exceptions while the latter does. Respondent does not provide a compelling argument for distinguishing *Integrated Informatics* from this case, and I see no reason to do so. If *Integrated Informatics* is to be limited only to the thirty day deadline at 20 C.F.R. § 655.806(a)(3), such a limitation should come from the Board itself, and not from an administrative law judge. I thus follow the reasoning of *Integrated Informatics* and find that the ten day deadline at 20 C.F.R. § 655.806(a)(2) does not bar the Administrator from acting on the complaint.

The Administrator's Determination Is Not Barred by Accardi

Respondent argues that the Administrator's Determination, even if not barred by the 12 month limitations period or the 10 day deadline discussed above, is barred by the doctrine established by the Supreme Court in *Accardi*. Respondent's Brief, at 15-17. Briefly, the doctrine is that regulations "promulgated by a federal agency, which regulate the rights and interests of others, are controlling on the agency." *Samirah v. Holder*, 627 F.3d 652, 664 (7th Cir. 2010) (internal marks and citation omitted). In introducing its discussion of the rule, the Seventh Circuit wrote:

Just as a state may give its people more legally enforceable rights than a statute or constitutional provision requires, so too may a federal agency, by a regulation within its authority to issue, grant persons subject to its authority more legally enforceable rights than a statute or a constitution gives them.

Id. (citations omitted).

The Administrator argues that "[t]he key requirement for application of the *Accardi* doctrine is that the regulation allegedly violated by the administrative agency grants legally enforceable rights." Administrator's Brief, at 8. The Administrator also argues that "[h]ere, Respondent has failed to outline any rights afforded it by the 10-day deadline." *Id.* I agree on both counts, and moreover find that Respondent did not identify any rights afforded it by the thirty day deadline. I thus find the *Accardi* doctrine inapplicable.

Respondent cites *Int'l Labor Mgmt. Corp. v. Perez*, No. 1:14CV231, 2014 WL 1668181 (M.D.N.C. Apr. 25, 2014) (order granting temporary restraining order, preliminary injunction, and writ of mandamus) for the proposition that *Accardi* applies to prevent the Administrator from taking action in this matter due to exceeding the regulatory deadlines. The *Int'l Labor* court found that with respect to certain H-2A deadlines, *Brock* prevented it from “disallowing the DOL from acting once the statutorily-derived time limits had run,” *id.* at *7, but it retained the “ability to provide equitable relief to ensure that the DOL acts within its statutory and regulatory mandates.” *Id.* The court then found that *Accardi* applied to regulatory H-2B deadlines requiring that the Department either accept an H-2B application or notify the employer as to deficiencies in the application within seven days, and that “[because] these deadlines detailed in the regulations are non-discretionary, ... they are subject to the same equitable relief as their H-2A statutory counterparts.” *Id.* at *10.

While the *Int'l Labor* court applied *Accardi* to a regulatory timeline and found it had the ability to order equitable relief,¹⁰ it declined to find that the Department’s failure to meet regulatory deadlines prevented the Department from acting once those deadlines had run. It simply ordered that the Department act within its deadlines. *Id.* at *16-*17. I decline to follow Respondent’s invitation to read the *Int'l Labor* decision so expansively as to interpret it to hold that the Department’s failure to follow its own regulatory deadlines prevents it from acting after those deadlines have expired.

Moreover, as the Administrator correctly notes, the regulations at issue in *Int'l Labor*, 20 C.F.R. §§ 655.31 and 655.33,¹¹ require the Department to give an employer notice. Assuming without deciding that requiring notice to an employer confers a right on an employer, no such right is conveyed by either the 10 day or the 30 day deadline at issue in this case. *Int'l Labor* is thus distinguishable on its facts.

The Administrator’s Determination Is Not Barred by Laches

Respondent argues that the doctrine of laches bars the Administrator’s determination. Respondent’s Brief, at 17-19. The Administrator responds that the doctrine of laches cannot be asserted against the government. Administrator’s Brief, at 10. I find that the doctrine of laches cannot be asserted in this case, but even if could be, it would not apply because Respondent has not shown the requisite prejudice.

With respect to whether laches applies in a case brought by the government, a district court in an enforcement action brought by the U.S. Environmental Protection Agency stated:

The defense of laches is applied by the court in equity, where one party has inexcusably delayed bringing the legal action, resulting in undue prejudice to the defendant. *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 804 (8th Cir. 1979). This defense is not available to actions brought by the United States. *See*,

¹⁰ As explained in the next section, the doctrine of laches does not apply in this case, and if it did, relief under that doctrine would nevertheless be unavailable.

¹¹ I have cited the regulations mentioned in *Int'l Labor*, at *10. The prior regulation appears to have been 20 C.F.R. § 655.143(a) (cited in the Administrator’s Brief, at 9 n. 4).

Guaranty Trust Co. v. United States, 304 U.S. 126, 132-33, 58 S.Ct. 785, 788-89, 82 L.Ed. 1224 (1938); and, *Bostwick Irrigation District v. United States*, 900 F.2d 1285 (8th Cir. 1990). Accordingly, this Court finds as a matter of law that Defendant is precluded from asserting the affirmative defense of laches in this action.

United States v. Sheyenne Tooling & Mfg. Co., Inc., 952 F. Supp. 2d 1414, 1419 (D.N.D. 1996). Under the cases cited by that district court and by the Administrator, as a matter of law I must find that Respondent cannot assert the doctrine of laches as a defense.

Even if Respondent could assert the doctrine of laches in this matter, I would nevertheless find that the doctrine is inapplicable because one of its two elements has not been established. “The doctrine of laches bars an action only when the delay in bringing the action both caused prejudice and was inexcusable.” *Cyberworld*, 602 F.3d at 200 (citation omitted). For purposes of this analysis, I assume without deciding that the lengthy delay in this case was inexcusable, and thus only consider the element of prejudice.

Respondent’s claims of prejudice are premised on an argument that, had the Administrator notified it of Mr. Peric’s complaint “in or around June 2010, it could have remedied any allegedly improper termination at that time, and avoided approximately 12 months of allegedly due back wages (over \$70,000.00).” Respondent’s Brief, at 18. At first blush, this argument appears to have merit. But once one recognizes that there is no requirement that the Administrator notify an H-1B employer that a complaint has been filed or that the Administrator has determined that an investigation is warranted, 20 C.F.R. §§ 655.806(a)(2) and (a)(3), and also that the argument assumes, without any support whatsoever, that Respondent would have remedied the alleged violations immediately upon being notified of the allegations, the argument loses force.

Because there is no requirement that an employer be notified when a complaint is filed or when a reasonable cause determination is made, the regulatory scheme contemplates a time period in which an employer may continue to violate applicable regulations, and thus accrue liability for violations, after a complaint has been filed. In this case, on or about January 23, 2013, the complaint was accepted for filing and the Administrator determined an investigation was warranted, the investigation began in March 2013, and the Administrator’s Determination was issued on September 10, 2013. The approximately eight and a half months that elapsed between the Administrator determining that an investigation was warranted and the issuance of the Administrator’s Determination indicates that it is speculative to assume that, if the investigation had begun shortly after June 28, 2010, it would have been completed in time to eliminate Respondent’s liability for back wages between that date and June 15, 2011, the date Mr. Peric left the country.

It is also speculative to assume that Respondent would have taken action to remedy any back pay allegedly due Mr. Peric upon mere notification by the Administrator that a complaint had been filed against Respondent, or upon receipt of the Administrator’s

Determination concerning Respondent's violations.¹² While I recognize that it is "the Department's experience that many employers quickly remedy violations when brought to their attention," Respondent's Brief, at 19 (quoting 65 Fed. Reg. 80,110, 80,117 (Dec. 20, 2000)), that does not mean that in every case employers immediately remedy violations upon notification, or that in this case Respondent would have done so. Accordingly, Respondent's argument that it would have remedied the violations at issue in this case is speculative.

Because I find Respondent's claims of prejudice speculative, even if the doctrine of laches could be asserted in this action brought by the U.S. government, the doctrine would not apply because the element of prejudice has not been established.¹³

Respondent Did Not Effect a Bona Fide Termination and Thus Must Pay Back Wages

Having found that neither the complaint nor the Administrator's Determination are time-barred, I now address whether Respondent must pay back wages to Mr. Peric. Respondent argues that it terminated its employment relationship with Mr. Peric in November 2008, and that pursuant to 20 C.F.R. § 655.731(c)(7)(ii), having effected a *bona fide* termination of Mr. Peric, it is not liable for back wages. Respondent's Response, at 2-7. In support of its position, it cites to *Adm'r v. Ken Technologies, Inc.*, No. 03-140, ALJ No. 2003-LCA-00015 (ARB Sep. 30, 2004). In *Ken Technologies*, the Board reversed an administrative law judge who found that "a termination is only bona fide if the employer notifies INS [now DHS] about the termination," holding, "whether a termination is bona fide does not turn solely on whether the employer notified INS. The employer should be permitted to present other evidence concerning whether it terminated the H-1B employee. Filing such notification with INS constitutes additional, not conclusive, evidence of termination." *Id.*, slip op. at 4-5.

As outlined above, there is no dispute that Respondent terminated Mr. Peric's employment effective November 25, 2008, and continued to pay him through November 30, 2008. There is also no dispute that Mr. Peric applied for unemployment benefits on December 9, 2008. Under *Ken Technologies*, it would appear Respondent effected a *bona fide* termination of Mr. Peric and thus would have no obligation to continue paying his wages even though it is undisputed that Respondent neither notified USCIS that it had terminated Mr. Peric's employment nor offered to pay for Mr. Peric's travel back to Canada. Unfortunately for Respondent, however, its reliance on *Ken Technologies* is misplaced.

After *Ken Technologies* was decided, the Board clarified that to effect a *bona fide* termination, more than simply terminating an H-1B worker's employment is required:

¹² Respondent was notified of the alleged violations on or about April 13, 2013. It would have been consistent with Respondent's argument that, if it had been notified earlier of the alleged violations, it would have "remedied any allegedly improper termination at that time, and avoided approximately 12 months of allegedly due back wages" for Respondent to have made payment of the back wages due shortly after April 13, 2013, which would have enabled it to avoid liability for interest due after that date. As there is no record that Respondent paid any amount of the back wages due once it was notified of the alleged violations, however, Respondent's argument that it could have paid back wages due upon notification is speculative at best.

¹³ Respondent does not argue that the delay in this matter prevented it from defending itself against the Administrator's allegations. See Respondent's Brief, at 17-19.

To effect a bona fide termination, an employer must (1) give notice of termination to the H-1B worker, (2) give notice to the Department of Homeland Security (USCIS), and (3) under certain circumstances, provide the H-1B nonimmigrant with payment for transportation home.

...

[S]ubsequent to *Ken Technologies*, the Board clarified in *Gupta* that notice to USCIS is but one of three necessary factors for concluding that an employer has effected a bona fide termination. As we held in *Gupta*, to effect a bona fide termination, the employer must take three steps, citing 20 C.F.R. § 655.731(c)(7)(ii): it must give the employee notice that the employment relationship is terminated; it must notify DHS that the employment relationship has been terminated; and it must provide the employee with payment for transportation home under certain circumstances.

Adm'r v. Univ. of Miami, Nos. 10-090 and 10-093, ALJ No. 2009-LCA-026, 2011 WL 6981994 at *7 (ARB Dec. 20, 2011) (footnotes including citations to *Gupta* and other cases and internal marks omitted). Under *Univ. of Miami*, it is clear that, *Ken Technologies* notwithstanding, merely terminating an H-1B worker's employment is not enough to effect a *bona fide* termination. Rather, termination of the worker's employment, notification to DHS of that termination, and in certain circumstances payment for the worker's trip home are required.

The undisputed facts establish that Respondent neither notified USCIS of its having terminated Mr. Peric's employment nor offered to pay for Mr. Peric's trip home. While Respondent indubitably terminated Mr. Peric's employment in November 2008, under *Gupta* and *Univ. of Miami* I must find that Respondent did not effect a *bona fide* termination of the employment relationship under 20 C.F.R. § 655.731(c)(7)(ii). I must therefore find that the employer's obligation to pay Mr. Peric's wages did not terminate until June 15, 2011, when Mr. Peric made himself unavailable to work by returning to Canada.

CONCLUSION AND ORDER

Based on the foregoing, I conclude the following:

Respondent is ORDERED to pay Mr. Peric back wages in the amount of \$182,943.65 for the period of December 1, 2008, to June 15, 2011. The Administrator shall calculate the accrued interest.

The Administrator's Determination, to the extent it addresses Respondent's "fail[ure] to pay wages as required in violation of 20 C.F.R. § 655.731, is AFFIRMED. (I make no rulings concerning the other three violations addressed in the Administrator's Determination as they are not before me.)

SO ORDERED.

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within thirty (30) calendar days of the date of issuance of the administrative law judge’s decision. *See* 20 C.F.R. § 655.845(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. *See* 20 C.F.R. § 655.845(a).

If no Petition is timely filed, then the administrative law judge’s decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 20 C.F.R. § 655.840(a).