



**ISSUE DATE: 16 JUNE 2016**

CASE No.: 2012-LCA-00044

*In the Matter of:*

**ADMINISTRATOR, WAGE AND HOUR DIVISION,**  
Prosecuting Party,

vs.

**VOLT MANAGEMENT CORP.**  
**d/b/a VOLT WORKFORCE SOLUTIONS,**  
Respondent.

### **Final Order Granting Summary Decision**

The Administrator of the United States Department of Labor's Wage and Hour Division ("the Administrator") initiated this matter after Sergey Nefedyev complained of wages he hadn't been paid. Nefedyev had been admitted to the U.S. on an H1-B non-immigrant visa his employer, Volt Management Corporation ("Volt"), obtained for him. The Immigration and Nationality Act ("INA")<sup>1</sup> and the implementing regulations of the Secretary of Homeland Security and Secretary of Labor together create that visa. The Administrator investigates and remedies any violation of an employer's duties under parts of the H-1B program assigned to the Secretary of Labor. To get Nefedyev's visa, Volt had submitted a labor condition application to the Secretary of Labor acknowledging its obligation to pay Nefedyev as the Secretary's regulations require.

The grievance raised in Nefedyev's September 22, 2009 complaint was that Volt failed to pay him from about June 30, 2009 (when work he had been assigned to do for another company came to a close) to about August 18, 2009 (when he received Volt's written notification that terminated his employment).<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 1182(n)(2)

<sup>2</sup> Complaint of Sergey Nefeyev, Exhibit 1 to the Declaration of Angela M. Sousa.

The Administrator admitted during discovery that he investigated Volt based on Nefedyev's complaint.<sup>3</sup> Yet that investigation ballooned to encompass far more than what Nefedyev alleged; in this proceeding the Administrator now seeks about \$330,000 in back wages on behalf of 80 employees.<sup>4</sup> Nefedyev's claim for relief has been fully resolved.<sup>5</sup>

Congress limited the circumstances in which the Administrator may expand an investigation beyond a grievance an individual H-1B worker presents. The way the statute is crafted may not be a model of comprehensive rationality, a shortcoming hardly unique to this Act. The wisdom of that limit on enforcement authority isn't a matter for me, for the Administrator, or for the Secretary to address in this enforcement proceeding. This decision concludes the Administrator lacked the prerequisites Congress required in the INA before the Administrator may broaden his investigation beyond Nefedyev's complaint.

Because the Administrator's investigation exceeded the scope Congress authorized, all claims other than those related to Nefedyev (which themselves have been resolved) are dismissed in this final order. This dismissal arises from Volt's motion for summary decision. The affidavit the Administrator submitted in opposition raises no factual disputes material to the narrow, controlling legal issue Volt has framed.

Four things can initiate an investigation and enforcement proceedings against an H-1B employer:

1. an investigation following receipt of a complaint filed by an aggrieved person or organization, pursuant to 8 U.S.C. § 1182(n)(2)(A);
2. a random investigation of an employer, if that employer has been found a willful violator within the past five years, pursuant to 8 U.S.C. § 1182(n)(2)(F);
3. an investigation after the Secretary of Labor personally certified, pursuant to 8 U.S.C. § 1182(n)(2)(G)(i), that there is reasonable cause to believe an employer is not in compliance with the INA; and
4. an investigation pursuant to 8 U.S.C. § 1182(n)(2)(G)(ii), where the Secretary received specific and credible information from a source likely to have knowledge of an

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<sup>3</sup> Exhibit 3 to the Declaration of Angela M. Sousa, Administrator's Response to Volt's Request for Admission 6.

<sup>4</sup> Administrator's Opposition to Volt's Motion for Summary Decision at 2.

<sup>5</sup> May 2, 2016 Order on Partial Consent Findings.

employer's practices that an employer has committed a willful failure, a pattern of practice of failures, or a substantial failure that affects multiple employees with respect to certain subsections of 8 U.S.C. § 1182(n)(1).

The first of the four applies here. Nefedyev initiated an "aggrieved party" complaint under 8 U.S.C. § 1182(n)(2)(A).<sup>6</sup> That section requires the Secretary to

establish a process for the receipt, investigation, and disposition of complaints respecting [an employer's] failure to meet a condition specified in [a labor condition application] or [an employer's] misrepresentation of material facts in such an application. . . . No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

The Secretary's ability to initiate a broad investigation into H-1B compliance upon receiving a single aggrieved party complaint was directly addressed recently by the United States Court of Appeals for the Eighth Circuit in *Greater Missouri Medical-Care Providers, Inc. v. Perez*.<sup>7</sup> Greater Missouri hired physical and occupational therapists from the Philippines and brought them to the U.S. on visas Greater Missouri obtained for them through the H1-B visa program.<sup>8</sup> For each visa, Greater Missouri filed a labor condition application with the Secretary, in which it agreed to pay wages and offer working conditions for its H1-B employees that conform to the INA and its regulations.<sup>9</sup>

One therapist, Alena Gay Arat, filed a complaint with a Missouri state agency that alleged Greater Missouri had violated requirements of the H1-B visa program. State regulators forwarded it to the Administrator, who treated it as an "aggrieved party" complaint.<sup>10</sup> An investigator from the Wage and Hour Division launched an extensive investigation into Greater Missouri's compliance with the INA.<sup>11</sup> The Secretary ultimately ordered Greater Missouri to pay \$372,897.93 in

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<sup>6</sup> Exhibit 3 to the Declaration of Angela M. Sousa, Administrator's Response to Volt's Request for Admission 6; Exhibit 4 to the Declaration of Angela M. Sousa, Interrogatory 23.

<sup>7</sup> 812 F.3d 1132 (8th Cir. 2015).

<sup>8</sup> *Greater Mo. Med. Pro-Care Providers, Inc. v. Perez*, 812 F.3d 1132, 1133 (8th Cir. 2015).

<sup>9</sup> *Greater Mo.*, 812 F.3d at 1133.

<sup>10</sup> *Greater Mo.*, 812 F.3d at 1134.

<sup>11</sup> *Greater Mo.*, 812 F.3d at 1134.

back wages to 44 employees (later amended to \$382,889.87 to 45 employees).<sup>12</sup>

After Greater Missouri requested an APA hearing, the administrative law judge ruled in a motion for summary judgment that the Secretary's broad investigation came within his statutory and regulatory authority.<sup>13</sup> Greater Missouri then appealed the decision that granted relief to the Secretary's Administrative Review Board ("ARB"). The Board affirmed the Secretary's authority to investigate whether violations of the INA extended to H1-B workers who had not filed complaints, but reversed another part of the ALJ's decision.<sup>14</sup> Greater Missouri petitioned for review under § 706 of the APA<sup>15</sup> in the United States District Court for the Western District of Missouri, which affirmed the ARB decision.<sup>16</sup> Greater Missouri then petitioned for review in the Eighth Circuit. It reversed.

Analyzing the INA's pertinent text, the Eighth Circuit held that "[t]he Secretary's expansive understanding of his investigatory authority is inconsistent with the plain language and structure of § 1182(n)."<sup>17</sup> The Eighth Circuit explained,

Rather than authorize an open-ended investigation of the employer and its general compliance without regard to the actual allegations in the aggrieved-party complaint, § 1182(n)(2)(A) expressly ties the Secretary's initial investigatory authority to the complaint and those specific allegations "respecting [an employer's alleged] failure to meet a condition specified in [a labor condition application] or [an employer's] misrepresentation of material facts in such [a labor condition application]" for which the Secretary finds "reasonable cause to believe" the employer committed the alleged violation. Read naturally, the Secretary's authority to conduct an initial investigation under § 1182(n)(2)(A) is based upon the Secretary finding reasonable cause to believe the employer's specific misconduct as alleged in the complaint violates the INA. That reasonable-cause finding limits the scope of the initial investigation.<sup>18</sup>

The Eighth Circuit concluded "[t]he Secretary's initial authority to investigate an aggrieved-party complaint is unambiguously limited

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<sup>12</sup> *Greater Mo.*, 812 F.3d at 1135.

<sup>13</sup> *Greater Mo.*, 812 F.3d at 1135.

<sup>14</sup> *Greater Mo.*, 812 F.3d at 1135; *Administrator v. Greater Missouri Medical Care Providers Inc.*, ARB Case No. 12-015 (January 29, 2014).

<sup>15</sup> 5 U.S.C. § 706.

<sup>16</sup> *Greater Mo.*, 812 F.3d at 1136; *Greater Mo. Med. Pro-Care Providers, Inc. v. Perez*, No. 3:14-CV-05028-MDH, 2014 U.S. Dist. LEXIS 151352 (W.D. Mo. Oct. 24, 2014).

<sup>17</sup> *Greater Mo.*, 812 F.3d at 1137–38.

<sup>18</sup> *Greater Mo.*, 812 F.3d at 1138 (internal citations omitted).

by the plain meaning of § 1182(n)(2)(A) to those timely allegations in the complaint for which the Secretary has found reasonable cause to investigate.”<sup>19</sup> The award the district court had upheld came from the Secretary’s unauthorized investigation of matters beyond what Arat raised in her complaint; the Eighth Circuit reversed and remanded the case.<sup>20</sup>

The Eight Circuit saw the INA text doesn’t permit a comprehensive investigation of an H-1B employer when the Secretary has received no more than a single complaint from an aggrieved employee. Comprehensive investigation is reserved to an employer found guilty of a willful violation in the past, under 8 U.S.C. § 1182(n)(2)(F), or done in the course of a general compliance review of an employer, under 8 U.S.C. § 1182 (n)(2)(G)(i). The statute does not permit the Secretary to turn any individual employee complaint into a comprehensive review. Failing to limit an investigation’s scope and the remedy to the individual complaint is unfaithful to the statutory text; it effectively converts every aggrieved-party complaint into a comprehensive compliance review.

Because the case at hand arose in the Ninth Circuit, I am not bound by the Eight Circuit’s decision in *Greater Missouri*. But having been reversed, ARB’s decision in *Greater Missouri* is not binding either. The ARB has had no occasion yet to revisit the issues raised in *Greater Missouri* in light of the change in the law—the Eighth Circuit’s holding. Until the issue is again reviewed by the ARB, it remains an open question whether a single aggrieved party complaint justifies a broad investigation into whether an employer violated the INA with respect to other H1-B employees. I follow the Eighth Circuit’s reasoning.

The Administrator urges me to consider the Secretary’s interpretation of the INA—and the reasoning behind it. Unsurprisingly, the Administrator takes an expansive view of his authority to investigate and seek relief for workers after he receives a complaint from an aggrieved H-1B visa holder. That sort of deference arises appropriately in courts when the meaning of a statute isn’t apparent from its text. Then deference becomes appropriate under *Chevron, U.S.A., Inc. v. NRDC, Inc.*<sup>21</sup>

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<sup>19</sup> *Greater Mo.*, 812 F.3d at 1139.

<sup>20</sup> *Greater Mo.*, 812 F.3d at 1141.

<sup>21</sup> 467 U.S. 837, 104 S. Ct. 2778 (1984). *Chevron* really has no application at OALJ, for it deals with how one independent branch of government (the Article III courts) should treat the final decisions of another branch (the Executive). This adjudication determines an antecedent question: just what the final decision of the Secretary should be. Once made, that final decision may be due *Chevron* deference in the courts. How to apply and interpret the text of a controlling statute inheres in what an administrative law judge does.

This statute is neither silent nor ambiguous about the scope of the Secretary's investigation. There are good policy arguments that could persuade Congress to allow broader investigations when the Administrator receives a single complaint. H-1B visa holders are brought into the United States for fixed, relatively short periods of three years as non-immigrants. They could be seen as a vulnerable population likely to be abused. But Congress did not see it that way. Congress constrained the Secretary's (and therefore the Administrator's) authority to investigate and to seek relief. The Secretary cannot countermand the statute, no matter how persuasive the reasons he offers. The audience the Secretary must persuade isn't me. It is Congress.

The Secretary's statutory interpretation argument fails, effectively at *Chevron* step zero. The plain meaning of the statute controls.<sup>22</sup>

The Administrator lacked authority to launch its broad investigation into Volt's compliance with the INA. The other claims, not being related to Nefedyev's complaint, are dismissed.

So Ordered.

William Dorsey  
ADMINISTRATIVE LAW JUDGE

San Francisco, California

**NOTICE OF APPEAL RIGHTS:** Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and

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<sup>22</sup> See, Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

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If no petition for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. *See* 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board's receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.