



**Issue Date: 30 October 2019**

CASE NO.: 2016-LCA-00019

*In the Matter of:*

**MAJID VARESS,**  
*Prosecuting Party,*

vs.

**PERSIAN BROADCAST SERVICE  
GLOBAL, INC.,**  
*Respondent.*

**DECISION AND ORDER AFTER REMAND**

This is a claim arising under the Immigration and Nationality Act (“INA” or “Act”) H-1B visa program, 8 U.S.C. §1182. I held a telephonic hearing in this matter on October 26 and 27, 2017. On December 14, 2017, I issued an Amended Decision and Order denying relief. An appeal followed, and on September 26, 2019, the Administrative Review Board issued its Decision and Order Reversing and Remanding, directing me to consider and issue findings with respect to 1) the timeliness of the Prosecuting Party’s February 5, 2015, complaint; and 2) if the complaint was timely, the computation of damages. Having carefully considered the record before me, I now find as follows.

**The Prosecuting Party’s Complaint is Timely**

The Prosecuting Party, Majid Varess, filed his complaint in this matter on February 5, 2015. Under 20 C.F.R. section 655.806, subsection (a)(5), an aggrieved party must file a complaint “not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA, or the date on which the employer, through its action or inaction, allegedly demonstrated a misrepresentation of a material fact in the LCA.”

This case involves two Labor Condition Applications. Before the telephonic hearing, the parties stipulated the Department of Labor approved the first (“LCA 1”) with a validity date of September 12, 2011, to September 23, 2013. LCA 1 sets forth an annual wage rate of \$45,000. The parties further stipulated that Respondent filed the second Labor Condition Application (“LCA 2”) in August, 2013, and the Department of Labor approved it with a validity date of September 12, 2013, to September 12, 2015. LCA 2 sets forth an annual wage rate of \$60,000.

In its Decision and Order Reversing and Remanding, p. 5, the Administrative Review Board found

In this case, Respondent failed to pay Complainant the required wage under the first LCA which was \$45,000 per year. Respondent also failed to pay Complainant the required wage of \$60,000.00 for the second LCA period. Because Respondent’s president signed and filed both LCAs with the DOL, it was legally obligated to pay the Complainant the specified wages when Complainant entered into employment until the LCA period expired unless an exception to that obligation applied.

The Board also concluded Respondent never effected a bona fide termination of the Mr. Varess’s employment under 20 C.F.R. section 655.731, subsection (c)(7)(ii),<sup>1</sup> and Mr. Varess never voluntarily requested voluntary nonproductive status under that same regulation. What is more, the Board ruled misconduct by Mr. Varess, as a matter of law, did not excuse Respondent’s obligation to pay the wages specified in an LCA. *See* 20 C.F.R. section 655.731, subsection (c)(7)(i).

Respondent advances two arguments to support its contention the February 4, 2015, complaint is untimely. First, Respondent contends Mr. Varess failed to renew his E-3 visa for the second LCA period, so the one-year period for filing a complaint would have commended upon expiration of his first visa on September 12, 2013. Second, Respondent contends Mr. Varess left the United States on November 16, 2013, and never returned – facts to which the parties stipulated before the telephonic hearing before me. Respondent contends Mr. Varess’s departure comprised, in essence, the termination of his employment, and accordingly the commencement of the one-year period for filing the complaint.

But under the legal principles set forth by the Administrative Review Board, neither line of argument is tenable. On the record before me, Respondent had a legal obligation to pay wages under LCA 1 and under LCA 2, and only a *bona fide* termination of employment or the employee’s request to be placed in nonproductive status can affect that legal obligation. Since neither condition occurred in this case,

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<sup>1</sup> Respondent apparently conceded this point in its brief before the Board. Decision and Order Reversing and Remanding, p. 5.

Respondent was obligated to pay LCA wages even after Mr. Varess filed his complaint. Accordingly, the complaint is timely.

### **The Record Shows \$183,794.00 in Damages**

Since the complaint was timely, I must calculate the damages to which the prosecuting party is entitled. As the Board noted, Mr. Varess entered the United States to begin work under LCA 1 on November 23, 2011 (Decision and Order Reversing and Remanding, p. 9, fn. 7). Respondent accordingly was obligated under LCA 1 to pay him \$45,000 per year from November 23, 2011, to September 11, 2013. Respondent was obligated to pay him \$60,000 per year under LCA 2 from September 12, 2013, to September 12, 2015. Thus, Respondent should have paid Mr. Varess about \$84,375.00 under LCA 1 (93.5 weeks of employment from about November 23, 2011, to September 11, 2013) and \$120,000.00 under LCA 2 (\$60,000.00 annually for two years), a total of \$204,375.00.

At the hearing, Respondent placed in evidence documents showing payments it made to Mr. Varess in 2013 and 2014 (RX 6). In 2013, Respondent appears to have paid Mr. Varess a total of \$9,000.00: \$1,500.00 in January and February, and \$1,200.00 in March, April, May,<sup>2</sup> June, and July. In 2014, Respondent avers it paid Mr. Varess a total of \$12,473.00 (as shown on a 2013 Form 1099-MISC, and on a “Find Report” document on the preceding page in RX 6). But it did not offer into evidence all of the checks referenced on the “Find Report;” instead, it offered copies (in many cases duplicate copies) of negotiated checks totaling only \$7,300.00.

Respondent<sup>3</sup> also introduced into evidence a February 5, 2015, letter from Attorney Norman J. Resnicow to the Department of Labor’s Wage and Hour Division on behalf of Mr. Varess (RX 2). In that letter, Attorney Resnicow states Respondent paid Mr. Varess \$20,581.00 while LCA 1 was in force – \$892 less than the \$21,473.00 Respondent attempts to document in RX 6, but considerably more than the \$16,300.00 supported by copies of negotiated checks. Since clarity and accuracy in record-keeping seems to be neither party’s strong suit, I accept Attorney Resnicow’s figure of \$20,581.00 as an admission.

Consistent with the Administrative Review Board’s determination that Respondent was obligated to pay wages under both LCA 1 and LCA 2, I conclude Respondent owes Mr. Varess \$183,794.00 in back wages (that is, gross salary of \$204,375.00 less the \$20,581.00 Mr. Varess admittedly received). He is entitled to recover prejudgment and postjudgment interest under *Mao v. Nasser Engineering & Computing Services*, ARB No. 06-121, ALJ No. 2005-LCA-36 (ARB Nov. 26, 2008).

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<sup>2</sup> The May payment came in two installments, one of \$300.00 and one of \$900.00 (RX 6).

<sup>3</sup> Mr. Varess did not introduce this document in support of his claim.

Mr. Varess seeks an award of attorney fees, but under *Talukdar v. U.S. Dept. of Veterans Affairs*, ARB No. 04-100, ALJ No. 2002-LCA-25 (ARB Jan. 31, 2007), attorney fees are not recoverable in this matter. Likewise, while the Administrator can award civil monetary penalties in an appropriate case, 20 C.F.R. section 655.801, subsection (b), Mr. Varess cites no authority for the proposition that I may do so in a case where he acts as Prosecuting Party, and I know of none.

### **ORDER**

After careful consideration of the record in the light of the Administrative Review Board's Decision and Order Reversing and Remanding, I find and conclude:

1. Mr. Varess's complaint in this matter was timely filed.
2. Respondent must pay Mr. Varess \$183,794.00 in back wages, together with prejudgment and postjudgment interest in an amount to be calculated by the Wage and Hour Division.

SO ORDERED.

CHRISTOPHER LARSEN  
Administrative Law Judge

**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 Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition only one copy need be uploaded.

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.