



In the Matter of:

MOHAMMED REHAN PURI,

ARB CASE NO. 13-022

PROSECUTING PARTY,

ALJ CASE NO. 2012-LCA-010

2008-LCA-038

2008-LCA-043

v.

**UNIVERSITY OF ALABAMA
BIRMINGHAM HUNTSVILLE,**

DATE: September 17, 2014

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

David E. Larson, Esq.; Altick & Corwin Co., L.P.A.; Dayton, Ohio

For the Respondent:

Alex R. Frondorf, Esq.; Littler Mendelson, P.C.; Atlanta, Georgia

For the Department of Labor's Acting Deputy Administrator (Amicus),

Quinn Philbin, Esq.; Paul L. Frieden, Esq.; William C. Lesser, Esq., Jennifer S. Brand, Esq; M. Patricia Smith, Esq.; United States Department of Labor, Washington, District of Columbia

Before: E. Cooper Brown, Deputy Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Lisa Wilson Edwards, Administrative Appeals Judge

FINAL DECISION AND ORDER

This case arises under the H-1B provisions of the Immigration and Nationality Act, as amended (INA or the Act).¹ The Administrative Review Board (ARB or Board) previously considered this case. In *Puri v. University of Alabama Birmingham Huntsville*, ARB No. 10-004, ALJ Nos. 2008-LCA-038, -043, 2012-LCA-010 (ARB Nov. 30, 2011), the ARB ruled that contrary to the determination of the Administrative Law Judge (ALJ), he had authority under 20 C.F.R. § 655.820 to address Puri's request for hearing on the payment of wages to the July 1, 2009 expiration of the labor condition application under which the University had hired him. Accordingly, the Board vacated the ALJ's Decision and Order and remanded the case for further proceedings.

On remand, the ALJ proceeded without a formal hearing. The ALJ explained, "On March 15, 2012, I spoke with counsel for the parties, who advised me that they anticipated that they would be able to enter into factual stipulations and submit written briefs without the necessity of a hearing. The parties submitted a joint stipulation of facts on May 29, 2012. Complainant submitted a written brief on July 25, 2012, and Employer submitted its brief on July 27, 2012. The Administrator submitted his brief on July 31, 2012. On October 9, 2012, the Complainant submitted a reply brief, and on October 10, 2012, the Employer and Administrator submitted reply briefs. The case is now ready for a decision." ALJ's Decision and Order at 3 (Oct. 23, 2012)(D. & O.); *see also* Respondent's Brief (Feb. 1, 2013), Exhibit 2.²

On the merits of the case, the ALJ determined that the sole issue was what liability, if any, the University has to pay Puri his wages beyond the date it last paid those wages, namely the effective date of his termination or July 27, 2007. Puri argued that the University did not effect a "bona fide termination" of their employment relationship until when, in June 2009, it provided Puri with the cost of his transportation home to Pakistan. Until then, Puri argued, he was in nonproductive status due to the University's decision not to assign him work and as such, the University remained liable for the payment of his wages under 20 C.F.R. § 655.731(c)(7)(ii). Complainant's Brief (July 23, 2012) at 16-17. *See* Employer's Exhibit 2 attachments marked Exhibits E, F.

The University argued that when on July 30, 2007, it notified the United States Citizenship and Immigration Services (USCIS) of the end of its employment relationship with Puri, it effected "a bona fide termination" ending its wage liability, having previously informed Puri that he was discharged. The University contended that under the circumstances of this case, the regulations do not require that it provide Puri with the cost of return transportation to Pakistan. Specifically, the University noted that before Puri's July 27, 2007 discharge and the

¹ 8 U.S.C.A. §§ 1101-1537 (Thomson Reuters 2014), as implemented by 20 C.F.R. Part 655, Subparts H and I (2014).

² By Order dated January 19, 2012, the Office of Administrative Law Judges (OALJs) granted Puri's motion in ALJ Case No. 2012-LCA-010 to consolidate that case with the instant cases, Case Nos. 2012-LCA-038, -043. The Order indicates that Puri filed the case in 2012-LCA-010 to preserve his claim to wages for the entirety of his authorized period of employment pursuant to the Labor Condition Application under which the University hired him, in the event his appeal herein was unsuccessful. In the same order, the OALJs canceled the scheduled hearing in 2012-LCA-010. Order Cancelling Formal Hearing And Granting Motion to Consolidate (OALJs Jan. 19, 2012).

University's ensuing July 30, 2007 notice to USCIS of that discharge, Puri informed the University, (1) that he would marry a United States citizen in May, and (2) that because of his marriage to a United States citizen he would not return to Pakistan but would remain in the United States. The University noted that Puri did just that: married a United States citizen in May, applied for a change in immigration status in June, and remained in the United States after his July discharge. Respondent's Brief, at 9-20 (July 26, 2012).

The ALJ determined that the University had no liability for wages beyond its July 30, 2007 notice to USCIS that Puri's employment had been terminated and the University's H-1B program petition should thus be cancelled. D. & O. at 6-10. The ALJ found that the University's liability for wages did not extend to June 2009, when it provided Puri with the cost of a return trip to Pakistan. The ALJ explained that the University was not required to cover this cost to establish a bona fide termination of its employment relationship with Puri or to otherwise establish an end to its liability for wages. The ALJ reasoned that prior to his July 2007 discharge Puri had changed his immigration status by marrying a United States citizen in May 2007, and had informed the University that in light of his marriage and ensuing change in immigration status, he did not intend to return to Pakistan. *Id.* at 8-10. Therefore, the ALJ concluded that the University owed Puri wages only through its July 30, 2007 notice to USCIS, which was three days beyond the last day it had paid him or July 27, 2007. The ALJ further found that because July 28 and July 29 were weekend days, the University owed Puri back wages only for Monday July 30. The ALJ awarded \$161.83 in back wages for July 30, 2007, with pre- and post-judgment interest. *Id.* at 10.

Puri appealed the ALJ's decision on remand. Puri claims that he is entitled to wages through his June 11, 2009 receipt from the University of the reasonable cost of his return transportation to Pakistan. The University urges the Board to affirm the ALJ's determination that the University was not required to render the reasonable cost of Puri's return transportation, and the University actually ended its obligation when on July 30, 2007, it informed USCIS that it had discharged Puri. The Acting Deputy Administrator for the Wage and Hour Division in his Amicus Brief, urges the ARB to affirm the decision below.

BACKGROUND

We briefly state the relevant facts as determined by the ALJ and stipulated to by the parties. The University employed Puri pursuant to a Labor Condition Application that the United States Department of Labor certified for the period from July 1, 2006, through July 1, 2009. Employer's Exhibit 2 (Joint Stipulation of Facts dated May 25, 2012) attachment marked Exhibit A.³ Puri worked for the University, and it is uncontested that the University later fired him effective July 27, 2007. Employer's Exhibit 2 attachment marked Exhibit C. It is

³ The United States Citizenship and Immigration Services approved on May 22, 2006, the Petition for a Nonimmigrant Worker (Form I-129) that the University filed May 3, 2006, with Puri as the beneficiary. Employer's Exhibit 2 and attachment marked "Exhibit I." That Petition and approval are not of record, however.

uncontested that prior to his July 2007 discharge, Puri married a United States citizen in May 2007, and filed an Application for Work Authorization in June 2007.

By letter dated July 30, 2007, the University informed USCIS that Puri no longer worked for the University and requested that the H-1B petition it had filed be “cancelled effective immediately.” On April 23, 2008, USCIS revoked its prior approval of that petition. Employer’s Exhibit 2 attachments marked Exhibits D, I.

By letter dated June 10, 2009, almost two years after the University discharged Puri, the University sent Puri a check for \$1,506 indicating that it constituted the reasonable cost of his return trip home to Pakistan, which check Puri received June 11. Employer’s Exhibit 2; Complainant’s Exhibit P. The University stated that by providing the check to Puri, it did not admit that it was obligated to pay Puri’s return transportation. Employer’s Exhibit 2. Puri did not return to live in Pakistan but continued to reside in the United States following his discharge and was still living in the United States when the ALJ adjudicated this case on remand in October 2012. D. & O. at 4-5, 9; *see* Employer’s Exhibits 2, 5.

Puri appealed to the ARB on November 20, 2012. The ARB issued a December 5, 2012 Notice of Intent to Review the appeal. The ARB specified the following issue for review:

Did the ALJ properly find that, under the facts of this case, the Respondent executed a bona fide termination of Puri’s employment on July 30, 2007, when it informed [the] United States Citizenship and Immigration Services that it had terminated . . . his employment, (thereby extinguishing its liability for further wages under a Labor Condition Application) even though at that time, it did not offer to pay for his return trip to Pakistan?

Notice of Intent to Review (Dec. 5, 2012) at 1. On review, we affirm the ALJ’s determination that the University ended its wage obligation on Monday July 30, 2007, and the University owes Puri wages and interest for that one final and additional day.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ’s decision.⁴ Where the statute and regulations provide no expressed standard of review, as in H-1B appeals, we choose to defer to the ALJ’s fact findings if they are reasonable, and we make reasonable inferences permitted by the ALJ’s findings and/or the undisputed record.⁵ The ARB has plenary power to review an

⁴ 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845; *see* Secretary’s Order No. 02-2012, 77 Fed. Reg. 69,378 (Nov. 16, 2012) (delegating to the ARB the Secretary’s authority to review cases arising under, *inter alia*, the INA).

⁵ *Administrator, Wage & Hour Div. v. XCEL Solutions Corp., et al*, ARB No. 12-076, ALJ No. 2011-LCA-016 (ARB July 16, 2014).

ALJ's legal conclusions de novo, including whether a party has failed to prove a required element as a matter of law.⁶

DISCUSSION

Statutory and Regulatory Framework

The Immigration Act of 1990 modified the H-1B program to allow for the admission into the United States of a limited number of temporary nonimmigrants to fill jobs in specialty occupations.⁷ The process of classifying and admitting nonimmigrants into the United States for employment involves four federal agencies: the Department of Labor, the Department of State, the Department of Justice, and the Department of Homeland Security (DHS).⁸ The H-1B nonimmigrant moves through three procedural phases that fundamentally impact DOL's resolution of H-1B wage complaints. The first of the three phases requires the H-1B petitioner to file a completed LCA with DOL for certification.⁹ In the LCA, the employer attests to the wage levels and working conditions, among other things, that it guarantees for the H-1B beneficiary for the period of his or her authorized employment.¹⁰ Second, if DOL certifies the LCA, then the employer must file with USCIS the LCA, along with the USCIS Form I-129 and other required documents, which collectively constitute an H-1B petition. Third, if USCIS grants the H-1B petition, the H-1B beneficiary must apply to the U.S. State Department to receive an H-1B visa.¹¹ The visa grants the H-1B beneficiary permission to seek entry into the United States up to a date specified on the visa as the "expiration date."

The Immigration Act of 1990 included a requirement that if an H-1B nonimmigrant "is dismissed from employment by the employer before the end of the period of authorized admission, [then] the employer shall be liable for the reasonable costs of return transportation of the alien abroad."¹² In 1990, the Immigration and Naturalization Service (now DHS)

⁶ *Limanseto v. Ganze & Co.*, ARB No. 11-068, ALJ No. 2007-LCA-005, slip op. at 3 (ARB June 6, 2013).

⁷ The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified in part at 8 U.S.C.A. § 1101(a)(15)(H)(i)(b)).

⁸ 20 C.F.R. § 655.705(a), (b).

⁹ 8 U.S.C.A. § 1182(n); 20 C.F.R. § 655.700-.760 (Subpart H).

¹⁰ 8 U.S.C.A. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.731, 655.732.

¹¹ 20 C.F.R. § 655.705(a), (b).

¹² The Immigration Act of 1990, Pub. L. No. 101-649, Sec. 207(b)(5), 104 Stat. 4978, 5026 (1990) (codified at 8 U.S.C.A. § 1184(c)(5)(A)).

promulgated a requirement that “[t]he petitioner shall immediately notify the Service of any changes in the employment of a beneficiary which would affect eligibility under 101(a)(15)(H) of the Act”¹³

After the Immigration Act of 1990, two statutory amendments made significant changes to the H-1B program. In 1998, the American Competitiveness and Workforce Improvement Act (ACWIA) clarified that the H-1B employer’s obligation to pay LCA wages continued during periods of non-productivity, except in a few instances.¹⁴ More specifically, 8 U.S.C.A. § 1182(n)(2)(C)(vii) provides that an H-1B employer violates the INA if it fails to pay an H-1B employee who is “in nonproductive status due to a decision by the employer (based on factors such as lack of work)”¹⁵ DOL subsequently promulgated regulations to implement the continuing wage obligations under ACWIA and to clarify that a bona fide termination can end the H-1B employer’s wage obligations.

With respect to a bona fide termination, the comments to those DOL regulations indicate:

The Department agrees that an employer is no longer liable for payments for nonproductive status if there has been a *bona fide* termination of the employment relationship. The Department would not likely consider it to be a bona fide termination for purposes of this provision unless [USCIS] has been notified that the employment relationship has been terminated pursuant to 8 CFR [§] 241.2(h)(11)(i)(A) and the employee has been provided with payment for transportation home where required by section 214(E)(5)(A) of the INA and [USCIS] regulations at 8 CFR [§] 214.2(h)(4)(iii)(E). In accordance with current [USCIS] policy (see 76 *Interpreter Releases* 378), once an employer terminates the employment relationship with the H-1B nonimmigrant, regardless of any arrangements for severance pay or benefits, that H-1B employee must either depart the United States upon termination of his or her services, or seek a change of immigration status for which he or she may be eligible. Therefore, under no circumstances would the Department consider it to be a *bona fide* termination if the employer rehires the worker if or when work later becomes available unless the H-1B worker has been working

¹³ Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 55 Fed. Reg. 2,606-01 (Proposed Jan. 26, 1990) (codified at 8 C.F.R. § 214.2(h)(11)(i)(A)).

¹⁴ The American Competitiveness and Workforce Improvement Act of 1998, Pub. L. 105-277, Sec. 413,112 Stat. 2681-641, 2681-647 (1998) (codified in part at 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I)).

¹⁵ 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I).

under an H-1B petition with another employer, the H-1B petition has been canceled and the worker has returned to the home country and been rehired by the employer, or the nonimmigrant is validly in the United States pursuant to a change of status.^[16]

The DOL regulation at 20 C.F.R. § 655.731(c)(7)(ii) provides, in pertinent part:

Circumstances where wages need not be paid. If an H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to work which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (e.g., touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant), then the employer shall not be obligated to pay the required wage rate for 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)(E)).

20 C.F.R. § 655.731(c)(7)(ii).

The USCIS regulation at 8 C.F.R. § 214.2(h)(4)(iii)(E) provides:

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 admission pursuant to section 214(c)(5) of the Act. If the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition, the alien has not been dismissed. If the beneficiary believes that the employer has not complied with this provision, the beneficiary shall advise the Service Center which adjudicated the petition in writing. The complaint will be retained in the file relating to the petition. Within the context of this paragraph, the term “abroad” refers to the alien’s last place of foreign residence. This provision applies to any employer whose offer of employment became the basis for an alien obtaining or continuing H-1B status.

¹⁶ Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models, 65 Fed. Reg. 80,171 (Proposed Dec. 20, 2000) (emphasis in original) (codified at 20 C.F.R. § 655.731(c)(7)(ii)).

8 C.F.R. § 214.2(h)(4)(iii)(E).

The ALJ's Award of Back Wages through July 30, 2007

The Board held in *Amtel Group of Fla., Inc. v. Yongmahapakorn*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 11 (ARB Sept. 29, 2006) that employers must meet three requirements to effect a bona fide termination of H-1B employment and end their obligation to pay wages promised under the Labor Condition Application(s): (1) expressly terminate the employment relationship with the H-1B nonimmigrant; (2) notify USCIS of the termination so that the petition may be cancelled, and; (3) provide the nonimmigrant with the reasonable cost of return transportation to his or her home country. But the Board recently recognized that the material facts of a case may warrant an exception to a strict application of these requirements in compliance with the H-1B visa program's statutory and regulatory scheme. *Batyrbekov v. Barclays Capital*, ARB No. 13-013, ALJ No. 2011-LCA-025 (ARB July 16, 2014)(*Amtel* definition of bona fide termination cannot be strictly applied to cases involving multiple H-1B employers).

The ALJ's determination that the criteria for effecting a bona fide termination are flexible, *see* D. & O. at 8, is consistent with the Board's recent decision in *Barclays Capital*. The ALJ permissibly ruled that the University effected a bona fide termination of Puri's employment on July 30, 2007, when it informed USCIS that Puri no longer worked for the University and requested that the agency revoke its approval of the H-1B petition the University had filed to hire Puri. *Id.* at 10. The ALJ rationally determined that the "clear intent" of the regulations at 20 C.F.R. § 655.731(c)(7)(ii) and 8 C.F.R. § 214.2(h)(4)(iii)(E) is to "prevent H-1B employees from remaining in the United States illegally once their petitions have been revoked." *Id.* at 8. The ALJ noted the exact language of Section 655.731(c)(7)(ii) that the employer's obligation to provide reasonable return transportation costs arises "only under certain circumstances" as when, the ALJ indicated, "the nonimmigrants have not otherwise obtained lawful status." *Id.* at 9. The ALJ rationally found that the Department of Labor's comments in the Federal Register to the preamble for Section 655.731(c)(7)(ii) provide support for this interpretation of the regulation where they make clear that "an H-1B worker must either leave the United States or seek a change in immigration status once its employment relationship has been terminated." *Id.* at 8 (*citing* 65 Fed. Reg. 80,171 (Dec. 20, 2000)). The ALJ properly concluded that awarding Puri back wages beyond the University's July 30, 2007 notice to USCIS and until 2009 when the University provided the cost of return transportation, would contravene the purposes of the Act and regulations where the facts are that Puri's May 2007 marriage to a United States citizen made him eligible for a change in immigration status and formed the basis for his decision not to return to his home country, a decision of which he informed the University before his discharge. The ALJ specifically found:

Similarly, Dr. Puri was able to change his immigration status by marrying a U.S. citizen which obviated the need for him to leave the United States.[] The clear intent of the regulations is to prevent H-1B employees from remaining in the United States illegally once their petitions have been revoked; employers are required to

pay for their return transportation only “under certain circumstances,” i.e., when the nonimmigrants have not otherwise obtained lawful status. *See* 20 C.F.R. § 655.731(c)(7)(ii) citing 8 C.F.R. § 214.2(h)(4)(iii)(E).

D. & O. at 8-9. The ALJ’s findings are both consistent with the H-1B visa program’s statutory and regulatory scheme and are amply supported by the record evidence.

Based on the foregoing discussion, we hold that the ALJ properly determined that the University effected on July 30, 2007, an end to its obligation to pay Puri his wages, and we thus affirm his award of back wages and interest for that one additional day.

CONCLUSION

The ALJ’s Decision and Order is **AFFIRMED**.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge