In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

PLAINTIFF,

v.

NOVINVEST, LLC,

ARB CASE NO. 03-060

ALJ CASE NO. 02-LCA-24

DATE: July 30, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Prosecuting Party Administrator, Wage and Hour Division:
Lois R. Zuckerman, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., *U.S. Department of Labor, Washington, D.C.*

For Respondent, Novinvest, LLC:
Ed Hyken*, Atlanta, Georgia*

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act, as amended (INA), 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2004), and regulations at 20 C.F.R. Part 655 (2003). Novinvest LLC (Novinvest) petitions for review of a Decision and Order (D. & O.) issued by the Administrative Law Judge (ALJ) on January 21, 2003. Novinvest is a corporation that engages in computer consulting and employs nonimmigrant alien computer programmer analysts. The ALJ found that Novinvest was liable for back wages to nonimmigrant workers, including an "investment fee" imposed against three of these workers. We modify the decision of the ALJ as explained below.

Jurisdiction and Standard of Review

The Administrative Review Board (ARB) has jurisdiction to review the ALJ's decision under 8 U.S.C.A. § 1182(n)(2), and 20 C.F.R. § 655.845. *See* Secretary's Order

No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

Under the Administrative Procedure Act, the Board, as the designee of the Secretary of Labor, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996), *quoted in Goldstein v. Ebasco Constructors, Inc.*, 1986-ERA-36, slip op. at 19 (Sec'y Apr. 7, 1992). The Board engages in de novo review of the ALJ's decision. *Yano Enterprises, Inc. v. Administrator,* ARB No. 01-050, ALJ No. 2001-LCA-0001, slip op. at 3 (ARB Sept. 26, 2001); *Administrator v. Jackson,* ARB No. 00-068, ALJ No. 1999-LCA-0004, slip op. at 3 (ARB Apr. 30, 2001). *See generally Mattes v. U.S. Dep't of Agriculture,* 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (rejecting argument that higher level administrative official was bound by ALJ's decision); *McCann v. Califano,* 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's decision by higher level administrative review body).

Regulatory Framework

The INA permits employers to employ nonimmigrant alien workers in specialty occupations in the United States. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b) (H-1B nonimmigrants). Specialty occupations are occupations that require "theoretical and practical application of a body of highly specialized knowledge, and . . . attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C.A. § 1184(i)(1). In order to be eligible for employment in the United States, these workers must receive H-1B visas from the State Department upon approval by the Immigration and Naturalization Service. 20 C.F.R. § 655.705(b). The employer concomitantly must obtain certification from the United States Department of Labor after filing a Labor Condition Application (LCA). 8 U.S.C.A. § 1182(n). The LCA must stipulate the wage levels and working conditions for the H-1B employees. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 655.732. Deductions from wages expressly *not* authorized under the regulations include "a penalty paid by the H-1B nonimmigrant for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer." 20 C.F.R. § 655.731(c)(10)(i). *See generally* D. & O. at 12-15, 20-21.

Issue

Did the ALJ correctly determine that Novinvest is liable for the $5,000 deduction from the salaries of its H-1B nonimmigrant employees and must compensate each worker for judgment amounts assessed?

Background

The ALJ has set forth the facts of the case in detail (D. & O. at 2-12), and we will not revisit them in their entirety. We limit our focus to the issue upon which Novinvest petitions for review. *See* Novinvest LLC Petition to Review the Decision and Order

dated February 18, 2003; 20 C.F.R. § 655.845(b)(3) and (4) (petition for ARB review must specify issues giving rise to petition and state specific reasons why petitioning party believes ALJ decision is in error).

Novinvest provides computer specialists "on a project basis to client companies." Prosecuting Party's Exhibit (PX) 5 at 1. Novinvest employed H-1B nonimmigrant "specialists" after it filed an LCA with the Department of Labor and after the Department of State, upon approval of the Immigration and Naturalization Service, issued the employees H-1B visas. The employees at issue for our purposes are Philip Peshin, Alex Koloskov, and Igor Viazovoi.[1]

Pursuant to an employment agreement, Novinvest required each of its employees to assume liability for a $5,000 investment fee. Captioned "Relocation Assistance," this provision of the agreement stated:

> The Company invests considerable time, effort and financial resources in organizing, assisting and transitioning the Employee to life in the US. The value of the Company's up-front investment (in order to hire, process and train Employee) is estimated as USD 5,000 (five thousand) per Employee. This investment is considered an interest-free loan from the Company to the Employee starting on the day employee arrives in the US. Every month, 1/12 (one twelfth) of the amount is forgiven by the Company, so that at the end of the Employee's first year with the Company the entire amount is forgiven. If the Employee leaves the Company's employment, for any reason, before the end of one year, or is terminated, the remaining balance becomes due, and the Employee must reimburse the Company.

PX 5 at 5. The employees never actually received $5,000, and Novinvest was unable to document expenditures of $5,000 for each employee. D. & O. at 5-6 (Stipulation No. 20,

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[1] These H-1B nonimmigrants, in addition to another nonimmigrant, Igor Politykin, arrived in the United States between March 2000 and April 2001. They arrived prepared to work, but Novinvest "benched" them and refused to pay them in violation of the INA. *See* 8 U.S.C.A. § 1182(n)(1)(A); 8 U.S.C.A. § 1182(n)(2)(C)(vii); 20 C.F.R. § 655.731(c)(7)(i) (if the H-1B nonimmigrant is not performing work and is nonproductive due to a decision by the employer (*e.g.*, due to lack of work) the employer is required to pay him at the wage listed in the LCA). After an investigation, the Administrator determined that Novinvest owed these employees back wages for benching periods during the course of employment. The ALJ upheld the Administrator's determination as well as the back wage calculations. D. & O. at 15-17. Novinvest did not appeal these findings.

Finding of Fact No. 4). All three employees resigned from Novinvest prior to their one-year anniversary date.

After a hearing, the ALJ found that the $5,000 investment fee constituted an impermissible early termination penalty and that Novinvest violated its wage obligations under the INA and implementing regulations by charging the H-1B workers the $5,000 penalty.[2] D. & O. at 19-22; 20 C.F.R. § 655.731(c)(10)(i); 20 C.F.R. §655.731(c)(11). The ALJ found Novinvest liable for the following amounts in compensation for the penalty: Peshin was due $5,000, Koloskov was due $2,347.52, and Viazovoi was due $1666.67. D. & O. at 22.

Novinvest had secured state court judgments against the respective employees, which included the $5,000 investment fee. D. & O. at 7-9 (Findings of Fact Nos. 7, 16, 21). The judgments against Peshin, Koloskov, and Viazovoi totaled $8,789.45, $2,347.52, and $1,666.66, respectively. Peshin paid none of his judgment, Koloskov paid $1,200 of his judgment, and Viazovoi paid $55 of his judgment. *Id.*

Discussion

In its petition for review, Novinvest argues that the ALJ erred in calculating the amounts owed to the three employees. First, according to Novinvest, the ALJ arbitrarily attributed the amounts awarded in the judgments against Koloskov and Viazovoi exclusively to the impermissible penalty when Novinvest presumably had asserted other claims. As evidence, Novinvest cites the $8,683.38 claim against Koloskov for which it received an award of only $2,347.52 and the $8,487.00 claim against Viazovoi for which it received an award of only $1,666.66. Second, according to Novinvest, "the amounts assessed to Novinvest should not exceed the amounts actually paid by the three individuals toward the satisfaction of Novinvest's judgments." Petition at 1. In other words, Peshin should receive nothing, Koloskov should receive $1,200, and Viazovoi should receive $55.

The INA and its implementing regulations expressly prohibit early termination penalties. Specifically, it is a violation of the INA

> for an employer who has filed an application under this subsection to require an H-1B nonimmigrant to pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer. The Secretary shall determine whether a required payment

[2] The Administrator's determination letter did not allege specifically that the "investment fee" requirement violated the INA, stating merely that Novinvest had "failed to pay wages as required." PX 29 at 1. The Administrator subsequently moved to conform the determination letter to the evidence to include allegations pertaining to the investment fee. Hearing Transcript at 129-131. The ALJ granted the motion, finding the early termination penalty issue properly before him. D. & O. at 18-19. Novinvest did not appeal this finding.

> is a penalty (and not liquidated damages) pursuant to relevant State law.

8 U.S.C.A. § 1182(n)(2)(C)(vi)(I). *See* 20 C.F.R. § 655.731(c)(10)(i) ("[a] deduction from or reduction in the payment of the required wage is not authorized (and therefore is prohibited)" for purposes of "[a] penalty paid by the H-1B nonimmigrant for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer"). The ALJ found that Novinvest violated the INA when it assessed the "investment fee" penalties (D. & O. at 19-22), and Novinvest has not appealed this aspect of the ALJ's decision. We find, therefore, that Novinvest is not entitled to recover from the nonimmigrants *any* of the $5,000 investment fees. We disagree with the ALJ, however, with respect to the back wage calculations. The ALJ determined that Novinvest owed each of the workers the full amount of the judgments assessed. We find instead that Novinvest is required to refund to Peshin, Koloskov, and Viazovoi monies actually paid by them as compensation for the investment fee penalty. Any fees or costs associated with collection of monies pursuant to that provision also must be refunded. We note that the Secretary is authorized to impose administrative remedies, including civil money penalties, for willful failure to meet a condition of an attestation or a willful misrepresentation of material fact in an attestation. *See* 8 U.S.C.A. § 1182(n)(2)(C); 20 C.F.R. § 655.810. Therefore, Noinvest may be subject to additional action by the Secretary if it engages in further efforts to obtain penalty provision funds.

Conclusion

Noinvest is not entitled to recover any amounts under the "Relocation Assistance" provision of its contracts with the H-1B nonimmigrant employees. The decision of the ALJ hereby is **MODIFIED** to order repayment of amounts paid by the nonimmigrants to Novinvest pursuant to the "Relocation Assistance" provision of the employment agreement, including any fees or costs in connection therewith.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge