In the Matter of:

RAVIKUMAR GUPTA, **ARB CASE NO. 05-008**

PROSECUTING PARTY, **ALJ CASE NO. 2004-LCA-39**

DATE: March 30, 2007

v.

JAIN SOFTWARE CONSULTING, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Prosecuting Party*:**
Ravikumar Gupta, *pro se*, Chicago, Illinois

For the Respondent:
Ruth I. Major, Esq., *Gardner Carton & Douglas,* Chicago, Illinois

ORDER OF REMAND

On September 12, 2003, Ravikumar Gupta filed a complaint with the Wage and Hour Division of the Employment Standards Division of the Labor Department (WHD). Gupta alleged that his employer, Jain Software Consulting, placed him in nonproductive status without pay, i.e., "benched" him, in violation of the Immigration and Nationality Act. 8 U.S.C.A. § 1101 *et seq.* (West 2005 & Supp.). A Labor Department Administrative Law Judge (ALJ) granted Jain's Motion to Dismiss, finding that Gupta filed his complaint too late.

The question presented to the Administrative Review Board for determination is whether Jain was entitled as a matter of law to a dismissal of Gupta's complaint because it was not timely filed.

BACKGROUND

In late 2000, Jain submitted a Labor Contract Agreement (LCA) to the Labor Department seeking certification to employ Gupta as a software consultant (programmer analyst). [1] The LCA provided that Jain would pay Gupta a base salary of $55,000 per year for the period February 10, 2001 to October 15, 2003. The DOL granted the certification and Jain hired Gupta on the basis of an H-1B visa.

Gupta worked for Jain from February 10, 2001 through July 2001. Gupta performed no work for Jain after July 2001 and Jain did not pay Gupta's salary for the period August 1, 2001 through October 15, 2003. Gupta claims Jain "benched" him. Jain claims Gupta stopped working for Jain to do other things. Benching an H-1B nonimmigrant, that is, placing him in nonproductive status without pay "due to a decision by the employer (e.g., because of lack of assigned work), lack of a permit or license," is a violation of the INA and its implementing regulations. 20 C.F.R. § 655.731(c)(7)(i) (2006); 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I).

Jain moved to dismiss Gupta's complaint without a hearing. It argued, "Although the parties dispute whether Gupta's leave of absence from Jain Software was voluntary or involuntary, the determination of this issue is irrelevant," because the 12-month limitations period for filing a benching complaint expired more than a year before Gupta filed his September 2003 complaint. Respondent's Motion to Dismiss at 3.

The applicable regulation provides that the limitations period is 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." 20 C.F.R. § 655.806(5).

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[1] The INA permits employers in the United States to hire nonimmigrant alien workers in specialty occupations. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b). These workers commonly are referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the specific specialty. 8 U.S.C.A. § 1184(i)(1). To employ H-1B nonimmigrants, the employer must fill out a Labor Condition Application (LCA). 8 U.S.C.A. § 1182(n). The LCA stipulates the wage levels that the employer guarantees for the H-1B nonimmigrants. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 655.732. After securing DOL certification for the LCA, the employer petitions for and the nonimmigrants receive H-1B visas from the State Department upon Immigration and Naturalization Service (INS) approval. 20 C.F.R. § 655.705(a), (b) (The INS is now the "U.S. Citizenship and Immigration Services" or "USCIS," which is located within the Department of Homeland Security (DHS). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002)).

Jain argued below that *Del. State Coll. v. Ricks*, 449 U.S. 260 (1980), applies to § 655.806(5). In *Ricks*, the Court held that the limitations period for filing a discriminatory termination complaint under Title VII begins when the employee receives notice of his termination. Jain averred that since Gupta knew in August 2001 that he was no longer receiving assignments or being paid by Jain, the 12-month period began in August 2001 and ended in August 2002. *Id.*

Alternatively, Jain argued, even if each pay period after July 2001 were considered a separate violation of the LCA, Gupta's complaint was still late. The INS revoked Gupta's visa in August 2002, more than 12 months before Gupta's September 2003 complaint. Due to revocation of his visa, "Gupta was not entitled to any pay at any time during the twelve-month period preceding his filing of his complaint with the DOL and accordingly his complaint should be dismissed." *Id.* at 4.

The ALJ agreed with Jain and concluded that the 12-month limitations period expired in August 2002, making Gupta's September 2003 complaint more than one year late. Slip op. at 3.

Ruling in the alternative, the ALJ also concluded that Jain effected a bona fide termination of its employment relationship with Gupta on or before August 2002, when it notified the Immigration and Naturalization Service that it had discharged Gupta from employment. "[U]nder this theory [Gupta's complaint] would still be untimely because Gupta was not a Jain employee within twelve months of September 12, 2003, the date the complaint was filed." Slip op. at 4. Accordingly, the ALJ granted Jain's motion to dismiss Gupta's complaint.

Gupta timely petitioned for review of the ALJ's dismissal.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB or the Board) has jurisdiction to review an ALJ's decision concerning the INA. 8 U.S.C.A. § 1182(n)(2) and 20 C.F.R. § 655.845. *See also* 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 Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision." 5 U.S.C.A. § 557(B) (West 2007). The Board engages in de novo review of an ALJ's INA decision. *Amtel Group v. Yongmahapakorn* (*Rung*), ARB No. 04-087, ALJ No. 04-LCA-006, slip op. at 5 (ARB Sept. 29, 2006).

DISCUSSION

The rules governing H-1B hearings and Board review contain no specific provisions for dismissal of complaints for untimely filing. *See* 20 C.F.R. § 655.835; 29 C.F.R. Part 18 (2006). It is therefore appropriate to apply Fed. R. Civ. P. 12(b)(6), the Federal Rule of Civil Procedure governing motions to dismiss for failure to state a claim on which relief can be granted. 29 C.F.R. § 18.1 (a); *Harvey v. Home Depot U.S.A., Inc.*, ARB No. 04-114, ALJ No. 04-SOX-20, slip op. at 11 (ARB June 2, 2006).

Under Fed. R. Civ. P. 12(b)(6), all reasonable inferences are made in the non-moving party's favor. *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 03-STA-47, slip op. at 4 (ARB Apr. 26, 2005). Dismissal should be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* slip op. at 5 (citation omitted).

On review, Gupta argues that the ALJ erred in holding that the limitations period begins to run in the first pay period in which an H-1B employer places the employee in nonproductive status. Gupta relies on the express terms of the regulation. P. Br. at 2-4. Gupta also argues that the ALJ erred in finding that Jain effected a bona fide termination of its employment relationship with him in August 2002. P. Reply Br. at 3-4. We consider each argument in turn.[2]

1. Commencement of limitations period

The implementing regulation provides as follows:

> A complaint must be filed 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 jurisdictional bar does not affect the scope of the remedies which may be assessed by the Administrator. Where, for example, a complaint is timely filed, back wages may be

[2] Gupta argues in the alternative that the limitations period should be tolled because (1) the attorney who purported to represent both Gupta and Jain did not notify Gupta that the INS had revoked his H-1B visa at Jain's behest and (2) Jain misled Gupta about the relevant limitations period by entering into a contract with him which, under relevant state law, would have allowed Gupta ten years to file a complaint for nonpayment during the LCA period. Because we find that Gupta's H-1B complaint was timely filed, we do not address Gupta's tolling argument.

> assessed for a period prior to one year before the filing of a complaint.

20 C.F.R. § 655.806(5) (emphasis added).

The ALJ's view that the limitations period for Gupta's benching complaint began in August 2001 amounts to a determination that the limitations period commences on the **earliest** date on which the employer fails to perform an action or fulfill a condition specified in the LCA. But the regulatory text expressly provides to the contrary – the 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. *See Innawalli v. Am. Info. Tech. Corp.*, ARB No. 04-165, ALJ No. 04-LCA-13, slip op. at 8 (ARB Sept. 29, 2006) ("an H-1B employer must pay the nonimmigrant employee the required wages even when the employee is not performing because of lack of work, i.e., is 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.

2. Bona fide termination

An employer need not pay wages to an H-1B nonimmigrant "if there has been a bona fide termination of the employment relationship." 20 C.F.R. § 655.731(c)(7)(ii). To effect a bona fide termination, the employer must take three steps. It must give the employee notice that the employment relationship is terminated. *Id.*, *Innawalli*, slip op. at 7. It must notify the Department of Homeland Security that the employment relationship has been terminated. And it must provide the employee with payment for transportation home under certain circumstances. *Id.; Rung*, slip op. at 11.[3]

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[3] The employer has the burden of proof on each element of a bona fide termination – an actual meeting of the minds between the employer and the nonimmigrant that the employment relationship is terminated; employer notice to the INS, and when appropriate, payment by the employer for the nonimmigrant's return home. *See e.g.*, *Administrator v. Ken Techs., Inc.*, ARB No. 03-140, ALJ No. 2003-LCA-015, slip op. at 4-5 (ARB Sept. 30, 2004) (the employer failed to establish a bona fide termination where the employer had issued a "termination letter" to the nonimmigrant but retained possession of the nonimmigrant's engineering certificate and omitted to notify INS of the alleged termination); *Rajan v. Int'l Bus. Solutions, Ltd.*, ARB No. 03-104, ALJ No. 03-LCA-12, slip op. at 4 (ARB Aug. 31, 2004)(the employer failed to carry its burden of proof on its claim that it had terminated the

In this case, the ALJ concluded that Jain effected a bona fide termination of its employment relationship with Gupta by notifying INS that it no longer employed Gupta. On that basis the ALJ concluded that any duty Jain had to Gupta pursuant to the LCA had expired more than 12 months before Gupta's September 2003 complaint.

But notice to INS is not enough. Jain has the burden on the question of whether it gave notice of termination to Gupta and whether it had a duty to provide Gupta with payment for transportation home and whether it satisfied that requirement. Most importantly, it is clear on the face of the pleadings that the parties have joined issue on a material question of fact, viz., whether, and if so, when Jain and Gupta terminated their employment relationship.

CONCLUSION

There being no limitations barrier to Gupta's complaint, we **REMAND** this case for further proceedings consistent with this decision.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge

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employment relationship where the employer issued a notice of termination to the INS but then continued to market the nonimmigrant's services and to offer her assignments); *Rung*, slip op. at 10-12 (the employer did not effect a bona fide termination where it provided the nonimmigrant with notice that her employment was being terminated but offered no evidence that it notified the INS or paid the nonimmigrant for her return home).