**In the Matter of:**

**ZHAOLIN MAO,** **ARB CASE NO. 06-121**

**PROSECUTING PARTY,** **ALJ CASE NO. 2005-LCA-036**

**v.** **DATE: November 26, 2008**

**GEORGE NASSER and NASSER ENGINEERING & COMPUTING SERVICES,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Prosecuting Party:***
Zhaolin Mao, *pro se*, Houston, Texas

***For the Respondents:***
Melissa Moore, Esq., *Moore and Associates*, Houston, Texas

## FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act, as amended (INA).[1] Zhaolin Mao (Mao) filed a complaint with the United States Department of Labor's Wage and Hour Division contending that his former employer, George Nasser, and Nasser Engineering & Computing Services (NECS) (jointly, Respondents), had violated the Act. In his complaint, Mao alleged that NECS failed to pay the higher of the prevailing or actual wage and failed to pay Mao for time when he was not working due to

[1] 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2004), as implemented by 20 C.F.R. Part 655, Subparts H and I (2008).

a lack of work. A Department of Labor (DOL) Administrative Law Judge (ALJ) found that NECS failed to pay Mao for time when he was not working due to a lack of work. The ALJ also found that NECS had not effected a "*bona fide* termination" of its employment relationship with Mao and thus owed him back wages. Therefore, the ALJ awarded Mao back wages, with interest. The Respondents appeal. We affirm the ALJ's decision.

## STATUTORY AND REGULATORY FRAMEWORK

The INA permits employers in the United States to hire nonimmigrant alien workers in specialty occupations.[2] These workers commonly are referred to as H-1B nonimmigrants. Specialty occupations are those occupations that require "theoretical and practical application of a body of highly specialized knowledge, and … attainment of a bachelor's or higher degree in a specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."[3] To employ H-1B nonimmigrants, the employer must fill out a Labor Condition Application (LCA) with DOL.[4] The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant for the period of his or her authorized employment.[5] After securing DOL certification for the LCA, the employer petitions for, and the nonimmigrant may receive an H-1B visa from the State Department upon United States Citizenship and Immigration Services (USCIS) approval.[6]

Under the INA's "no benching" provisions, the employer is obligated to pay the required wage even if the H-1B nonimmigrant is in "nonproductive status" (i.e., not performing work) "due to a decision by the employer (e.g., because of the lack of assigned work) …."[7]

But the employer does not have to continue to pay the H-1B nonimmigrant if "there has been a *bona fide* termination of the employment relationship." The employer must notify the federal government that the employment relationship has ended so that it may revoke approval of the H-1B visa.[8] Additionally, the employer need not pay wages

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2 8 U.S.C.A. § 1101(a)(15)(H)(i)(b).

3 8 U.S.C.A. § 1184(i)(1).

4 8 U.S.C.A. § 1182(n).

5 8 U.S.C.A. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.731, 655.732.

6 20 C.F.R. § 655.705(a), (b).

7 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(7)(i).

8 20 C.F.R. § 655.731(c)(7)(ii); 8 U.S.C.A. § 214.2(h)(11).

to an H-1B nonimmigrant who is in nonproductive status due to conditions unrelated to employment that remove the nonimmigrant from his or her duties at his or her "voluntary request and convenience" or render the H-1B non-immigrant unable to work.[9]

## BACKGROUND

At all relevant times, Nasser owned NECS, a software development, engineering and consulting partnership located in Houston, Texas.[10] In January 2001, NECS subcontracted with Mao's then-employer, who employed him under the H-1B program, for Mao's services as a senior software developer at $48,000 annual salary. Mao thus began his subcontract work for NECS.

In February 2001, NECS filed an LCA seeking certification to employ Mao as a full-time computer engineer at the wage rate of $48,000 per year.[11] DOL certified the LCA in March 2001, and USCIS approved the petition for H-1B status that May, for the period from May 1, 2001, to February 25, 2004.[12]

Mao began working for NECS in May 2001. NECS paid Mao $4,333.33 per month for several months and $6,333.33 per month for several months.[13] These monthly wages paid to Mao exceeded the $4,000 monthly wage based on the $48,000 annual wage rate listed in the LCA. Nasser testified that the amounts NECS paid Mao over the $4,000 monthly contract amount were salary advances or, alternatively, payroll accounting errors.[14] Mao asserted to the ALJ that NECS raised his salary to $52,000 per year by verbal agreement in April 2001 – prior to the May 1, 2001 start of the period of authorized employment under the LCA. But Mao also asserted to the ALJ that the monthly payments that exceeded the monthly contract amount or $4,000, were either overtime pay or pay for extra work. At the hearing, however, Mao testified that he was not claiming overtime pay.[15]

NECS paid Mao a monthly wage of $3,000 on both July 31, 2002, and August 28, 2002. Nasser testified that Mao had agreed to a reduction in his pay for those two months

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9 20 C.F.R. § 655.731(c)(7)(ii).

10 Decision and Order (D. & O.) at 3-4.

11 Respondents' Exhibit E.

12 Prosecuting Party's Exhibit 2.

13 Respondents' Exhibit F.

14 T. at 106, 242-47.

15 T. at 163, 166.

because Nasser had notified Mao in June that NECS had no work for him and would terminate his employment if no other work materialized. NECS did not pay Mao any wages after the August 28, 2002 payment of $3,000.

Nasser argued to the ALJ and to us that he terminated Mao's employment on August 30, 2002, effective August 31, 2002. Nasser explained at the hearing that NECS's only client had informed him in April 2002, that Mao's services might no longer be needed because it planned to perform in house with its own information technology staff the work that Mao had been performing for it.[16] Mao's work for NECS's sole client ended on June 14, 2002.[17] Nasser testified that he told Mao that NECS had no work for him, so Mao had to choose whether to be terminated subject to rehire should another project materialize, or to be put on personal leave for July and August at reduced pay to give Mao an opportunity to find other work.[18] Nasser testified that Mao elected to take personal leave at a reduced monthly wage of $3,000 for July and August 2002.

Nasser testified that he terminated Mao's employment in a meeting they had on August 30, 2002. Nasser testified that on that day, he drafted the August 31, 2002 letter of termination, *see* Respondents' Exhibit B, had the letter in the room where he and Mao met, but admitted that he did not deliver it to Mao because he heeded Mao's plea for ninety-days personal leave, in the hope that a project would materialize during that time.[19] The record contains no evidence that Nasser notified USCIS that he terminated Mao's employment.

Mao testified that thereafter, in November 2002, Nasser assigned him a "Foreclosure Data System" project that he completed and submitted in mid-December. It is undisputed that Mao then requested and Nasser approved a three-month personal leave of absence for the period from December 23, 2002, through March 22, 2003.[20] Nasser testified that when, in March 2003, he again showed Mao the August 2002 termination letter and told him he had to notify USCIS of the termination, Mao pleaded for another six months of unpaid personal leave which Nasser said he would grant if he could do so legally.

At the hearing, Mao characterized Nasser's testimony on the alleged termination as false, and denied receiving the termination letter on August 30, 2002, or on any date

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16 T. at 256, 258.

17 T. at 115, 117, 258, 260.

18 T. at 118-120, 260-61.

19 T. at 272-277, 321.

20 T. at 147-148.

before the time of the October 2005 hearing.[21] Mao testified that from August 30, 2002, he was in non-productive status because NECS had no work for him and was waiting for another project to materialize; that he stayed in contact with Nasser and inquired after work. Therefore, Mao claimed that Nasser "benched" him and he is due wages for his non-productive time between August 30, 2002, and February 25, 2004, the end of the period of authorized employment under the LCA, with the exception of three months of personal leave Mao acknowledges he took from December 23, 2002, to March 22, 2003.[22] Mao testified that his H-1B visa expired February 25, 2004.[23]

Mao filed a complaint with the Department of Labor's Wage and Hour Division (WHD) on January 6, 2005.[24] Mao checked a box alleging that NECS violated the INA by failing to pay him the higher of the prevailing wage or actual wage.[25] But Mao explained that his claim was that he "went months without compensation."[26] Mao also checked a box indicating that NECS violated the INA by failing to pay him for "time off

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[21] T. at 136, 139, 142, 183.

[22] T. at 76, 183, 277.

[23] T. at 19-20. At the October 2005 hearing, Mao testified that he was living in Houston and had applied for a "H4" visa by virtue of the fact that his wife was working in the United States. T. at 20, 108-109, 124, 128, 137-139. *See* 8 U.S.C.A. § 1101(a)(15)(H)(iv) (visa for spouse or child of H-1, H-2, or H-3 visa holder.)

[24] Administrative Record, *see* D. & O. at 2 n.3.

[25] The enforceable wage obligation for an employer of an H-1B nonimmigrant is the "actual wage" or the "prevailing wage," whichever is greater. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731(a). In this case, the "prevailing wage for the occupational classification in the area of intended employment," 20 C.F.R. § 655.731(a)(2), as listed in the LCA is $41,209 per year. Respondents' Exhibit E. But Mao received an "actual wage" greater than the "prevailing wage."

"The actual wage is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question." 20 C.F.R. § 655.731(a)(1). NECS had no other employee with experience and qualifications similar to Mao's. *See* D. &. O at 21. The regulation at 20 C.F.R. § 655.731(a)(1) provides that "[w]here no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B non-immigrant." The ALJ found that NECS "consistently" paid Mao $4333.33 per month; that this wage rose to $6,333.33 per month for five months and reverted back to $4,333.33 for several months. D. & O. at 21. The ALJ thus "deemed" $4,333.33 per month to be the "actual wage." *Id.* The ALJ's determination is consistent with the record before us and with the applicable law and we agree with it. Therefore, we conclude that the "actual wage" is $4,333.33 per month and is enforceable against NECS.

[26] Administrative Record. *See* D. & O. at 2, n3.

due to a decision by the employer (e.g. for lack of work)…."[27] Mao explained in the complaint that NECS failed to pay him for months when he was not working due to a "lack of work."[28] After conducting an investigation, WHD issued a July 8, 2005 determination that NECS had not violated the INA.[29] Mao appealed and the case was assigned to the ALJ for a hearing.

The ALJ addressed Mao's allegation that NECS had failed to pay him his wages over several months. The ALJ found that $4,333.33 per month was the "actual wage" paid to Mao and was enforceable against NECS.[30] The ALJ also determined that NECS was obligated to continue paying Mao that "actual wage" during periods when he was in non-productive status due to a lack of work. Therefore, the ALJ concluded that NECS was obligated to pay Mao $4,333.33 per month as of the May 14, 2001 monthly salary pay date.[31]

Also, the ALJ found that contrary to Nasser's contention, NECS had not effected a "bona fide termination" of its employment relationship with Mao under the INA. Rather, the ALJ found evidence of "a continuing employment relationship" and noted that it was "undisputed that Nasser did not report the termination or any change in the employment relationship to [USCIS] until close to or after the expiration of Mao's H-1B visa on February 25, 2004," and never tendered the costs of Mao's return transportation home as would have been required under 8 C.F.R. § 214.2(h)(4)(iii)(E).[32] Therefore, the ALJ held that Mao was entitled to back pay until the LCA expired on February 25, 2004, for each month he was productive as well as for each month he was in non-productive status due to a lack of work. While noting that the INA does not specifically provide for interest relative to an award of back pay, the ALJ also ordered NECS to pay post-judgment interest under 26 U.S.C.A. § 6621(a)(2) (short-term Federal rate plus three percentage points).[33]

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[27] *Id.*

[28] *Id.*

[29] Administrative Record. *See* D. & O. 2 n.3 and n.5. WHD did not include an explanation of its determination that NECS had not violated the INA.

[30] D. & O. at 21.

[31] *Id.* at 22.

[32] *Id.* at 23. Pursuant to 8 U.S.C.A. § 1184(c)(5)(A) and 8 C.F.R. § 214.2(h)(4)(iii)(E), an employer will be liable for the reasonable costs of the H-1B nonimmigrant's return transportation 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.

[33] The ALJ also found (1) that Mao did not indicate to NECS that he had received a Masters of Science degree in computer science and thus had not misrepresented his

The Respondents filed a timely petition for review.[34]

## JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has jurisdiction to review the ALJ's decision.[35] Under the Administrative Procedure Act, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[36] The ARB has plenary power to review an ALJ's factual and legal conclusions de novo.[37]

## DISCUSSION

**NECS did not effect a "*bona fide* termination" of its employment relationship with Mao. Rather, their employment relationship continued until the February 25, 2004 expiration of Mao's authorized period of employment.**

The ALJ considered whether NECS had effected a "*bona fide* termination" of its employment relationship with Mao under the INA in accordance with 20 C.F.R. § 655.731(c)(7)(ii) and found that it had not. With regard to an employer's obligation to pay wages to the H-1B nonimmigrant, 20 C.F.R. § 655.731(c)(7)(ii) provides:

> 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

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qualifications in the hiring process and (2) that NECS had offered Mao health insurance as required, but that Mao had declined it. These findings are not before us on appeal. *See* Respondents' Brief at 18-19, n.19; Prosecuting Party's Response Brief.

[34] *See* 20 C.F.R. § 655.655.

[35] 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845 (2008). *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).

[36] 5 U.S.C.A. § 557(b) (West 2008).

[37] *Yano Enters., Inc. v. Administrator*, ARB No. 01-050, ALJ No. 2001-LCA-001, slip op. at 3 (ARB Sept. 26, 2001); *Administrator v. Jackson*, ARB No. 00-068, ALJ No. 1999-LCA-004, slip op. at 3 (ARB Apr. 30, 2001).

> transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).[38]

Therefore, to effect a bona fide termination under the H-1B program, the employer must notify DHS that the employment relationship is terminated, and, where appropriate, provide the nonimmigrant employee with payment for transportation home.[39]

The ALJ found that Mao's and Nasser's testimonies, as well as other evidence, "suggest that the termination letter was not delivered to Mao until shortly before the hearing" in October 2005.[40] The ALJ held, however, that the issue whether or not Nasser delivered the termination letter to Mao was not critical to determining the issue whether NECS effected a bona fide termination because NECS failed to report the termination to DHS as required.[41] Having allegedly terminated Mao's employment in August 2002, before the expiration of his authorized period of employment, NECS would have had to tender to Mao payment for his return home.[42] The ALJ found that NECS had not.[43]

Further, the ALJ determined that Nasser's and Mao's documented actions and communications after Mao's alleged August 30, 2002 termination evidenced an ongoing employment relationship under the H-1B provisions "or belie a *bona fide* termination of such a relationship."[44] The ALJ added, "Nasser's self-serving statements and testimony to the effect that the employment relationship was terminated and that, to the extent that it technically continued, Mao was in legitimate unpaid status are unavailing under the circumstances of this case."[45] The ALJ determined that Nasser's failure to report to DHS the alleged August 30, 2002 termination, as well as the Respondents' failure to prove that

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38 The acronym "DHS" refers to the United States Department of Homeland Security; USCIS is an agency within DHS. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002).

39 *Amtel Group of Florida, Inc. v. Yongmahapakorn (Rung),* ARB No. 04-087, ALJ No. 2004-LCA-006, slip op at 9-11 (ARB Sept. 29, 2006).

40 D. & O. at 24.

41 *Id.*

42 *See* 8 U.S.C.A. § 1184(c)(5)(A) and 8 C.F.R. § 214.2(h)(4)(iii)(E).

43 D. & O. at 24.

44 *Id.*

45 *Id.*

Mao was thereafter on extended personal leave at his own choosing, confirmed that there was no bona fide termination of Mao's employment.[46]

The Respondents argue to us that Nasser terminated Mao's employment when, in an August 30, 2002 meeting with Mao, Nasser "presented" Mao with a letter in which Nasser informed Mao of his decision to terminate his employment effective August 31, 2002.[47] The Respondents, however, also assert that when Mao became distraught upon learning that his employment was terminated, Nasser granted him up to six months leave and agreed "to not notify [DHS] of the termination."[48] The Respondents argue that the existence of the August 31, 2002 termination letter "clearly establishes that [Mao] was terminated even though it is apparent that [Nasser] showed sympathy" for Mao's situation.[49]

Alternatively, the Respondents contend that should the ARB find that NECS did not terminate Mao's employment on August 30, 2002, Mao is not entitled to wages after that date because he was on extended personal leave by his own choosing until February 25, 2004, when his period of authorized employment expired.[50] Despite this argument, the Respondents state that Mao may be entitled to wages from January 1, 2004, through February 25, 2004, because he demanded wages from NECS.[51]

We agree with the ALJ's conclusion that the record shows that NECS did not effect a bona fide termination of Mao's employment under the INA and its implementing regulations because it did not notify DHS of the termination or tender payment for Mao's return transportation home. Like the ALJ, we find that NECS's failure to report to DHS its termination of Mao's employment "is the critical element of proof that there was no *bona fide* termination of the employment relationship that would have relieved Nasser of the liability to pay Mao his full salary."[52] The record contains no evidence that the Respondents ever notified DHS of its alleged termination of Mao's employment or tendered payment for Mao's return transportation home. Critically, the Respondents do not argue to us that they notified DHS of NECS's termination of Mao's employment at

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46 *Id.* The ALJ critically found that the testimonies of Nasser and Mao "prove[] that Nasser never completely foreclosed the possibility of another project for Mao." *Id.* at 25.

47 Respondents' Brief at 22; *see* Respondents' Exhibit B.

48 Respondents' Brief at 22.

49 *Id.* at 23.

50 *Id.* at 23-24; *see* 20 C.F.R. § 655.731(c)(7)(ii).

51 Respondents' Brief at 25.

52 D. & O. at 25

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any time prior to the February 25, 2004 expiration of Mao's authorized period of employment under the LCA. Consequently, we hold that the Respondents cannot meet their burden to establish DHS notification and thereby fail to establish an end to their obligation to pay Mao's "actual wage."

As to NECS's alternative argument that Mao was on extended leave at his own choosing after August 31, 2002, the record does not support this assertion. We find, as the ALJ found, that Mao was ready and willing to take on new projects, but that NECS did not have assignable work and cooperated with Mao to perpetuate a false impression of his status vis-à-vis the immigration authorities.

Because NECS did not effect a "*bona fide* termination" of Mao's employment under the INA in accordance with 20 C.F.R. § 655.731(c)(7)(ii), its obligation to pay Mao the "actual wage" continued until the expiration of Mao's authorized period of employment.

**NECS is liable for back wages**

In signing and filing an LCA, an employer attests that for the entire "period of authorized employment," the required wage rate will be paid to the H-1B nonimmigrant.[53] The "actual wage" is $4,333.33 per month[54] and is enforceable against NECS for Mao's period of authorized employment from May 1, 2001, to February 25, 2004, expect for the three months during which Mao was on leave at his own choosing.[55] Because NECS did not effect a "*bona fide* termination" of Mao's employment, its obligation to pay Mao his wages continued until February 25, 2004.[56]

The "wage rate" "means the remuneration (exclusive of fringe benefits) to be paid, stated in terms of amount per hour, day, month, or year."[57] An employer's required wage obligation to an H-1B nonimmigrant employee includes the obligation "to offer benefits and eligibility for benefits provided as compensation for services to H-1B nonimmigrants on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers."[58] Because Nasser testified that NECS paid its

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53 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731(a).

54 *See* discussion, *supra* at n.25.

55 Prosecuting Party's Exhibit 2.

56 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731(a).

57 20 C.F.R. § 655.715.

58 20 C.F.R. § 655.731(a).

employees their wages on a monthly basis, Mao was entitled to $4,333.33 per month.[59] NECS is entitled to receive credit for any month in which it met this wage obligation.

NECS paid Mao at least $4,333.33 each month from May 14, 2002, to July 3, 2002, and thereby satisfied its wage obligation for those months. But NECS paid Mao only $3,000 on both July 31, 2002, and August 28, 2002, and did not meet its wage obligation for those two months. These monthly wage payments were each $1,333.33 under the "actual wage" rate. NECS owes Mao $2,666.66 for these two months. NECS did not pay Mao the eighteen monthly wage payments due from the end of September 2002 to February 25, 2004.[60] NECS owes Mao these monthly wages, less the three months from the end of December 2002 to the end of March 2003, when it is undisputed that Mao was in nonproductive status by choice. Thus, NECS owes Mao fourteen monthly payments of $4,333.33, or $60,666.62, plus one pro-rated monthly payment of $3,586.20, plus the above-described wage underpayment of $2,666.66. Therefore, NECS owes Mao a total of $66,919.48 in back wages. Accordingly, we affirm the ALJ's order of $66,919.48 in back wages.

Further, Mao is entitled to interest on his back pay award. The Respondents do not challenge the ALJ's award of interest. The ALJ relied in part on the ARB's decision in *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 1989-ERA-022 (May 17, 2000).[61] *Doyle* arose under the whistleblower protection provisions of the Energy Reorganization Act (ERA) of 1974.[62] Neither the INA nor the ERA specifically authorizes an award of interest on back pay. Nevertheless, the ARB held in *Doyle* that a "back pay award is owed to an individual who, if he had received the pay over the years, could have invested in instruments on which he would have earned compound interest."[63] The ARB reasoned that in light of the "remedial nature of the ERA's employee protection provision and the 'make whole' goal of back pay," prejudgment interest on back pay "ordinarily shall be compound interest."[64] Moreover,

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[59] Respondents' Exhibit E. Nasser testified that NECS paid wages on a monthly basis. T. at 241, 243, 244.

[60] Mao's period of authorized employment ended February 25, 2004. That month had twenty-nine days. Because Mao could only have worked through February 24, 2004, we find, as did the ALJ, that he is due a prorated monthly wage for that month. For those twenty-four days, Mao is entitled to $3,586.20 ($4,333.33 monthly "actual wage" divided by 29 days = $149.42/day, multiplied by 24.)

[61] D. & O. at 26. The ARB has applied *Doyle* to back pay awards under the INA. *E.g.*, *Rung*, slip op. at 12-13; *Innawalli v. Am. Info. Tech. Corp.*, ARB No. 04-165, ALJ No. 2004-LCA-13, slip op. at 8 (Sept. 29, 2006).

[62] 42 U.S.C.A. § 5851 (West 1993).

[63] *Doyle*, slip op. at 16.

[64] *Id.*

the ARB held that the same rate of interest would be awarded on back pay awards, both pre- and post-judgment; that interest rate being the interest rate charged on the underpayment of federal income taxes prescribed under 26 U.S.C. § 6621(a)(2) (Federal short-term rate plus three percentage points.)[65] Consequently, we hold that Mao is entitled to prejudgment compound interest on the back pay award and post-judgment interest from the date of the ALJ's D. & O. until satisfaction in accordance with the procedures to be followed in computing the interest due on back pay awards outlined by the ARB in *Doyle*.[66]

**The ALJ did not abuse his discretion when he declined to consider the Respondents' proposed exhibits K, M-P because they were not properly offered or received post hearing.**

The Respondents contend that the ALJ erroneously refused to admit to the record their proposed exhibits K, M-P, which they submitted for the first time in their post-hearing brief to the ALJ.[67] The ALJ declined to admit these documents to the record because they had not been offered or received into evidence during the hearing and no motion accompanied the submission. *Id.* On appeal, the Respondents note that the ALJ admitted, over the Respondents' counsel's objection, Prosecuting Party's Exhibits 17-19. Respondents' Brief at 28-29. The Respondents contend that the ALJ erred in not allowing proposed exhibits K, M-P into the record. Their sole argument in support of this contention, however, is that the ALJ should have admitted them into the record because they "are similar types of evidence" in relation to Prosecuting Party's Exhibits 17-19.

We review an ALJ's determinations on evidentiary rulings under an abuse of discretion standard, i.e., whether, in ruling as he did, the administrative law judge abused the discretion vested in him to preside over the proceedings.[68] In this case, the record shows that the Respondents had ample opportunity to present their case and to develop and submit all evidence they deemed relevant. Therefore, when in his D. & O. the ALJ declined to admit certain documents to the record because they had not been proffered during the hearing and had been submitted post-hearing with no accompanying motion, he did not abuse his discretion.

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[65] *Id.* at 18.

[66] *Cf. Doyle,* slip op. at 16-18.

[67] *See* D. & O. at 2-3, n.5.

[68] *See e.g. Chelladurai v. Infinite Solutions, Inc.,* ARB No. 03-072, ALJ No. 2003-LCA-004, slip op. at 9 (ARB April 26, 2006).

## CONCLUSION

There is no evidence that NECS notified DHS of its termination of Mao's employment or tendered payment for Mao's return transportation home. Therefore, NECS did not effect a "*bona fide* termination" of its employment relationship with Mao under the H-1B program on August 30, 2002. Rather, the parties' employment relationship continued until February 25, 2004.

NECS is liable to Mao for $4,333.33 per month for each month that he was either actively working or not working due to a lack of work. NECS did not fulfill this wage obligation. Accordingly, we **ORDER** NECS to pay Mao $66,919.48 in back wages, which amount excludes monthly wages for the months of January, February, and March 2003, when Mao was on leave by his own choice. We **AFFIRM** the ALJ's Order accordingly. Mao is also entitled to pre- and postjudgment interest.

**SO ORDERED.**

**WAYNE C. BEYER**
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**
**Chief Administrative Appeals Judge**