In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,	**ARB CASE NO. 07-008**
	ALJ CASE NO. 2005-LCA-037
PROSECUTING PARTY,	**DATE: December 31, 2008**

v.

HELP FOUNDATION OF OMAHA, INC., AND ANIL K. AGARWAL,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:
Jonathan L. Snare, Esq., Steven J. Mandel, Esq., William C. Lesser, Esq., Paul L. Frieden, Esq., Paula Wright Coleman, Esq., ***United States Department of Labor,*** **Washington, D.C.**

For the Respondents:
Thomas C. Underwood, Esq., Omaha, Nebraska

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act, as amended (INA).[1] The Department of Labor, Employment Standards Administration, Wage and Hour

[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).

Division (WHD) investigated the Help Foundation of Omaha, Inc. (Help Foundation) and its president Anil K. Agarwal (Agarwal) (jointly Respondents) after Vikrant Salaria (Salaria), a former employee, alleged to WHD that the Respondents failed to pay his wages.[2] As a result of its investigation, WHD determined that the Help Foundation violated the INA's H-1B provisions when it failed to pay Salaria the required wage. The Respondents requested a hearing, which a Department of Labor (DOL) Administrative Law Judge (ALJ) held on February 22 and 23, 2006, in Omaha, Nebraska.[3] The ALJ found that the Help Foundation failed to pay Salaria, a non-immigrant worker, the required wage under the H-1B provisions of the Act and owed him $39,666.47 in back wages, plus interest.[4] The ALJ found that both Agarwal and the Help Foundation were liable for the payment of the back wages. Therefore, the ALJ ordered the Respondents to pay Salaria $39,666.47 in back wages plus interest as calculated in accordance with 28 U.S.C.A. § 1961. 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.[5] 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."[6] To employ H-1B nonimmigrants, the employer must fill out a Labor Condition Application (LCA) with DOL.[7] The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-

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[2] Hearing Transcript (T.) at 28, 42; Administrator's Response Brief at 2.

[3] Post-hearing, the parties stipulated that the Help Foundation was entitled to a $10,302 "wage credit," an amount it originally reported as "non-employee compensation" to Salaria in 2004 on Internal Revenue Service Form 1099, which amount was subsequently reported as wages. Post-Trial Stipulations dated June 21, 2006; *see* Administrator's Exhibit K 9 (before the ALJ, the Administrator's Exhibits were designated "Complainant's Exhibits" (CX)). The Administrative Law Judge (ALJ) credited the Help Foundation with the payment of these wages. Decision and Order (D. & O.) at 16. The Administrator asserts to us that "the parties stipulated that $39,666.47 in back wages would be due, assuming liability." Administrator's Brief at 3, *see also* at 11-12. The Respondents do not contest that representation.

[4] D. & O. at 16.

[5] 8 U.S.C.A. § 1101(a)(15)(H)(i)(b).

[6] 8 U.S.C.A. § 1184(i)(1).

[7] 8 U.S.C.A. § 1182(n).

1B nonimmigrant for the period of his or her authorized employment.[8] 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 of a Petition for a Nonimmigrant Worker.[9]

The required wage or enforceable wage obligation for an employer of an H-1B nonimmigrant is the "actual wage" or the "prevailing wage," whichever is greater.[10] In this case, the "prevailing wage for the occupational classification in the area of intended employment" as listed in the LCA is $118,222 per year.[11] "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."[12] In this case, neither party adduced evidence of other individual(s) with experience and qualifications similar to Salaria's. 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 Help Foundation paid Salaria $49,000 in wages over his nine-month employment.[13] Because the prevailing wage or $118,222 per year was higher than the actual wage paid Salaria or $49,000 over nine months ($65,333.33 per year), the prevailing wage is the required wage enforceable against the Help Foundation.

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) …."[14]

But the employer does not have to continue to pay the H-1B nonimmigrant the required wage "if there has been a *bona fide* termination of the employment relationship."[15] The employer must notify the Department of Homeland Security (DHS) that the employment relationship has ended so that the federal government may revoke approval of the Petition for a Nonimmigrant Worker, and must, under certain

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

9 20 C.F.R. § 655.705(a), (b).

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

11 20 C.F.R. § 655.731(a)(2); *see* Administrator's Exhibit A.

12 20 C.F.R. § 655.731(a)(1).

13 D. & O. at 16.

14 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(7)(i).

15 20 C.F.R. § 655.731(c)(7)(ii).

circumstances, provide the nonimmigrant with payment for transportation home.[16] Additionally, the employer need not pay wages 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.[17]

BACKGROUND

Agarwal is president of the Help Foundation, a not-for-profit Nebraska corporation that at all relevant times operated medical clinics in Omaha, Nebraska and Council Bluffs, Iowa.[18] Agarwal ran the Help Foundation. Agarwal hired all employees, determined clinic schedules, set employee schedules and wages, and signed all paychecks.[19]

Salaria is a medical doctor who, on a J-1 visa, completed his medical residency in Omaha, Nebraska in 2003, and is licensed to practice medicine in Missouri, Iowa, and Nebraska.[20] Agarwal interviewed Salaria in October 2003 and they signed a "Physician Employment Agreement" that November, which reflected an annual wage of $125,000.[21]

On February 4, 2004, Agarwal signed and filed a Petition for Non-Immigrant Worker with USCIS to hire Salaria as full-time medical doctor with H-1B non-immigrant status from June 15, 2004, through June 14, 2007.[22] Agarwal indicated in the Petition

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[16] 20 C.F.R. § 655.731(c)(7)(ii); 8 U.S.C.A. § 214.2(h)(11). 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 employer dismisses the alien from employment before the end of the authorized admission period pursuant to section 214(c)(5) of the Act.

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).

[17] 20 C.F.R. § 655.731(c)(7)(ii).

[18] Administrator's Exhibit E. The State of Iowa, Department of Public Health, designated Council Bluffs, Iowa as an underserved area. Administrator's Exhibits HH, KK.

[19] T. at 59-63, 141, 168-70, 234-37, 250-51, 260-61; Administrator's Exhibit S.

[20] T. at 117-120.

[21] *Id.* at 122, 125-126, 128; Administrator's Exhibit B.

[22] Administrator's Exhibit D.

that the Help Foundation would pay Salaria an annual wage of $125,000 and that Salaria would work in Council Bluffs, Iowa.[23]

On April 28, 2004, Agarwal signed and filed with the DOL a Labor Condition Application (LCA) seeking certification for the Help Foundation to employ Salaria as a full-time physician with H-1B non-immigrant status for the period from June 15, 2004, to June 14, 2007.[24] Agarwal indicated in the LCA that Salaria's annual rate of pay would be $125,000 and that Salaria would work in Council Bluffs, Iowa where the prevailing wage was $118,222.[25] DOL subsequently certified the LCA and USCIS approved the Petition for Non-Immigrant Worker with H-1B status that May, for the period from June 15, 2004, to June 14, 2007.[26] Previous thereto, in April 2004, USCIS had approved the Help Foundation's March 2004 application for Salaria to waive the two-year foreign residency requirement by virtue of his status as a "J-1 Exchange Alien."[27] The State Department approved Salaria's visa in June 2004 and he came to the United States from India on June 15, 2004.[28]

Salaria began working for the Help Foundation on June 22, 2004; he worked in medical clinics in Omaha, Nebraska and Council Bluffs, Iowa.[29] In a letter dated March 18, 2005, the Help Foundation notified Salaria that it was terminating his employment.[30] Salaria's last day of employment was Monday, March 21, 2005; when he reported to work the clinic receptionist told him to collect his personal belongings and leave his office key.[31] Each Help Foundation employee who testified at the hearing that they had knowledge of Salaria's schedule, testified that he never took any personal time off for

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23 *Id.*

24 Administrator's Exhibit A.

25 *Id.*

26 Administrator's Exhibit G.

27 *Id.* J-1 visa holders are entitled to enter the United States for graduate medical training. *See* 8 U.S.C.A. § 1182(e).

28 T. at 138, 139.

29 *Id.* at 54, 77, 112, 130, 139-140, 150, 225, 286.

30 Administrator's Exhibit L. The record contains no evidence that the Respondents notified DHS that they terminated Salaria's employment or tendered payment of the costs of his return trip home.

31 T. at 150, 184-185.

sickness or vacation and never missed a day of work, consistent with Salaria's testimony.[32] This evidence is uncontradicted.

The Help Foundation paid Salaria a total of $49,000 in wages during the course of his nine-month employment from June 22, 2004, through March 21, 2005, as reported by the Help Foundation to the Internal Revenue Service.[33] This $49,000 in wages for nine-months of employment (or $65,333.33 per year) falls below both the $125,000 per year wage Salaria contracted for and Agarwal listed in the LCA and the $118,222 per year prevailing wage Agarwal listed in the LCA.[34]

By letter dated September 21, 2005, the Respondents' counsel, Thomas C. Underwood (Underwood), informed DOL that the Help Foundation had terminated Salaria's employment effective March 18, 2005.[35] Underwood enclosed a copy of the LCA and requested that the "application be shown as withdrawn on your records, effective as of the date of such employment termination."[36]

On November 4, 2005, Paul M. Pierre (Pierre), USCIS, informed the Respondents that USCIS "had received correspondence" indicating that Salaria was no longer employed by the Respondents.[37] Pierre stated that in accordance with 8 U.S.C.A. § 214.2(h)(11)(ii), USCIS's approval of the Petition for a Nonimmigrant Worker was revoked as of November 4, 2005.[38]

On February 1, 2006, Carl Kulczyk, Iowa Department of Public Health, informed USCIS that he had in turn been informed that Salaria "has left his employer and has opened his own practice which is against the rules stipulated to receive a J-1 Visa waiver."[39]

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32 *Id.* at 79 (Linda Cotton), 150-51 (Salaria), 239-41 (Lora Howard), 253-54 (Cherie Fox), 263-64 (Sherri Rogers).

33 Administrator's Exhibits H, I, K; D. & O. at 16.

34 Administrator's Exhibits A-C.

35 Respondents' Exhibit 60.

36 *Id.*

37 Respondents' Exhibit 61. Pierre does not identify the source of that correspondence.

38 *Id.*

39 Respondents' Exhibit 57.

After the Help Foundation purportedly terminated his employment, Salaria alleged to WHD that his employer had violated the Act by failing to pay his wages. WHD investigated and, on July 11, 2005, determined that the Help Foundation had violated the Act by failing to pay Salaria $49,968.50 in wages, which it owed him plus interest.[40] The Respondents requested and received a hearing. The ALJ issued the decision, from which the Respondents appeal, on August 29, 2006.

THE ALJ'S DECISION

The ALJ found that the prevailing wage or $118,222 per year was enforceable against both the Help Foundation and Agarwal, and he ordered them to pay $39,666.47 in back wages with interest.[41]

The Respondents argued to the ALJ that Salaria had requested to work only part-time and worked only part-time, which excused their failure to pay him the required wage. Agarwal testified that Salaria requested a part-time schedule because he had "no hospital privilege, no ID number, no Medicare, Medicaid, nothing."[42] But the ALJ found that Salaria's testimony that he never asked for only part-time work and worked a full-time schedule was consistent with the testimony of clinic employees Cotton, Howard, Fox, and Rogers.[43] Agarwal also testified that Salaria made the request to work only part-time because he had a three-year old child whom he had to care for.[44] The ALJ, however, found that these employees' testimony contradicted Agarwal's testimony, as did day care records indicating that Salaria's child was enrolled in day care full-time.[45]

Further, the Respondents argued to the ALJ that Salaria acquiesced to part-time work by accepting wages for part-time work. But the ALJ rejected the argument because it was essentially contrary to the weight of the evidence and contrary to Salaria's "credible testimony" that he repeatedly protested his underpayment and was placated by

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[40] Administrator's Exhibit V; Respondents' Exhibit 13.

[41] D. & O. at 20-24.

[42] T. at 374. WHD's investigator, Susan Wagner (Wagner), testified that during the course of the investigation Agarwal explained to her that the reason that he did not pay Salaria the prevailing wage was because "there were a lot of business expenses put in to opening the clinic for Dr. Salaria's purposes … [and] … Dr. Salaria wasn't bringing in enough patients or [was] not seeing enough patients that the clinic was losing money." *Id.* at 30.

[43] D. & O. at 18.

[44] T. at 389.

[45] D. & O. at 18-19; Administrator's Exhibit T.

Agarwal's promises that he would "catch up" on the arrears in wages.[46] Moreover, the ALJ noted that Agarwal had never notified DOL that Salaria was working part-time only, in contravention of the representations the Respondents had made to the DOL and USCIS.[47]

In support of their contention that Salaria worked only part-time, the Respondents offered the testimony of Wendy Britton (Britton). The Respondents hired Britton to review billing and coding documents to determine how much time Salaria spent seeing patients.[48] Britton testified that Salaria "over-coded" on "CPT" or "treatment" coding, which "over-inflated the total number of minutes that" she calculated he was seeing patients.[49] But the ALJ discounted Britton's testimony for many reasons. The ALJ found that Britton's knowledge of the billing process was not current and her opinion was based on selective and incomplete information in that she did not know whether the clinical journals she reviewed included visits that were never billed, or whether the number of patients she counted as having been seen by Salaria included seventy-four disability patients he saw, and she admitted that she did not know the journals' author, did not verify any data they contained, did not inspect underlying documentation, and did not interview any of Salaria's patients to determine whether or not Salaria spent as much time with the patients as he billed.[50]

The Administrator correctly notes in his Brief to us that even if Britton's opinion were credible, and the ALJ in essence found that it was not, the issue is not how many patients Salaria saw but whether he made himself available to see patients.[51] Critically, the ALJ found that the Administrator's "more than adequate evidence" established that Salaria made himself available to work and the Respondents had established no circumstances which would relieve them of their obligations under the Act.[52] The ALJ found that Salaria was entitled to $39,666.47 in back wages and that both the Help Foundation and Agarwal were liable for the payment thereof.[53]

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[46] D. & O. at 19; T. at 156, 161-63, 193.

[47] *Id.* at 19.

[48] T. at 316, 320.

[49] *Id.* at 317-18, 324, 330-31; *see* Administrator's Exhibit FF.

[50] D. & O. at 19; T. at 304, 322, 326-29, 334, 335.

[51] Administrator's Brief at 11 n.11.

[52] D. & O. at 20.

[53] *Id.*

The Respondents filed a timely petition for review.[54] The Respondents state that their appeal is limited to the ALJ's back wages award.[55] The Respondents add that as to the ALJ's finding that Agarwal is personally liable for the payment of back wages "under a corporate veil piercing, while the Respondents do not necessarily agree with the rationale upon which he relied to arrive at that determination, we nevertheless have chosen not to contest his reasoning in regard thereto in this instance."[56]

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has jurisdiction to review the ALJ's decision.[57] 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 . . . ."[58] The ARB has plenary power to review an ALJ's factual and legal conclusions de novo.[59]

DISCUSSION

The Help Foundation and Agarwal are liable for back wages calculated using the prevailing wage rate of $118,222 per year for Salaria's nine-month employment during which time he worked as assigned and made himself available for work.

"Respondents concede that, as regards the salary which HELP *intended* to pay Salaria, the location of his place of employment and the prevailing wage in that location, the ALJ's interpretation of the Labor Condition Application was accurate in all respects."[60] The Respondents contend, however, that the ALJ's finding that Salaria

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54 *See* 20 C.F.R. § 655.655.

55 Petition for Review at 3.

56 *Id.*

57 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).

58 5 U.S.C.A. § 557(b) (West 2008).

59 *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).

60 Respondents' Supporting Brief at 2-3 (emphasis in original).

worked full-time is contrary to the record. In support of their contention, the Respondents rely on evidence that Salaria's work in Omaha, Nebraska contravened his obligation to work in Council Bluffs, Iowa as a condition of the waiver of foreign residency requirement he obtained in connection with the J-1 visa he had.[61] The Respondents also rely on evidence that Salaria did not work enough clinical hours or see enough patients for a minimum of forty hours per week.[62] But whether or not Salaria saw patients for a minimum of forty hours per week or whether or not his work in Nebraska contravened his obligation to work in Iowa, is not determinative of the issue of whether or not the Respondents are liable for Salaria's unpaid 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.[63] As discussed *supra*, the required wage is the prevailing wage, or $118,222 per year, and is enforceable against the Respondents by virtue of their filing of the LCA in which they indicated that Salaria's position was full-time. To the extent that Salaria experienced periods of unproductiveness, the reason was not because of his unavailability or unwillingness to work. Rather, any unproductive time experienced by

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[61] *Id.*; *see* Respondents' Exhibit 57. J-1 visa holders are entitled to enter the United States for graduate medical training, but must return to their home country for two years before becoming eligible to apply for an immigrant or nonimmigrant visa or for permanent residency. *See* 8 U.S.C.A. § 1182(e). If an interested state agency makes a request on behalf of the J-1 visa holder, however, the visa holder may obtain a waiver of the foreign residency requirement if the visa holder agrees to practice medicine for at least three years in a geographic area designated by the federal government as having a shortage of health care professionals. *See* 8 U.S.C.A. § 1184.

Salaria's waiver was granted on March 16, 2004. Administrator's Exhibit G. The Administrator argues to us that the Respondents' arguments, (1) that Salaria misrepresented his work location to the Iowa authorities in obtaining the foreign residency waiver, and (2) that "Salaria's failure" to notify USCIS of the termination of his employment under the H-1B program and the ensuing change in his employment status, have no relevance to the question of whether the Respondents are liable for unpaid wages. Administrator's Brief at 27. Technically, the Administrator is correct. But it is the Administrator's duty to administer the H-1B program. And in this case, Salaria remained in the country after the March 2005 termination of his employment under the H-1B program, and by February 2006 had opened his own practice in Omaha, Nebraska when he should not even have been present in the country. *See* Respondents' Exhibit 57. Certainly, Agarwal must share the blame where there is no evidence that he or the Help Foundation notified DHS of the termination of Salaria's employment. 20 C.F.R. § 655.731(c)(7)(ii); *see Zhaolin Mao v. George Nasser & Nasser Engineering & Computing Servs. (Mao),* ARB No. 06-121, ALJ No. 2005-LCA-036 (ARB Nov. 26, 2008.)

[62] Respondents' Supporting Brief at 3-5.

[63] 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731(a).

Salaria was attributable to a lack of patients coming to the Help Foundation's clinics for medical attention. The weight of the testimony and documentary evidence shows that Salaria was ready and willing to see patients during all his shifts and was available for work assignment at Agarwal's discretion. Therefore, any nonproductive periods Salaria experienced were due to lack of work and, therefore, are compensable under the Act.[64]

The Help Foundation paid Salaria a total of $49,000 during his nine-month employment. Applying the prevailing wage or $118,222 per year, the Help Foundation should have paid Salaria a total of $88,666.47 in wages for those months. Therefore, the Respondents owe Salaria $39,666.47 and the parties so stipulate.[65]

Further, Salaria is entitled to interest on his back pay award. The Respondents do not challenge the ALJ's award of interest. The INA does not specifically authorize an award of interest on back pay. Nevertheless, the ARB held in *Doyle v. Hydro Nuclear Servs.,* ARB Nos. 99-041, 99-042, 00-012; ALJ No. 1989-ERA-022 (May 17, 2000), 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."[66] 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."[67] Moreover, 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.)[68] Consequently, we hold that Salaria is entitled to prejudgment

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[64] 8 U.S.C.A. § 1182(n)(2)(c)(2)(vii)(I); 20 C.F.R. § 655.731(c)(7)(i); *U.S. DOL, WHD v. Kutty*, ARB No. 03-022, ALJ Nos. 2001-LCA-010 through 2001-LCA-025, slip op. at 6-8 (ARB May 31, 2005).

[65] In support of their contention that Salaria accepted part-time wages for part-time work, the Respondents argue that three payments of $3,000 to Salaria were advances against future wages. Respondents' Brief at 3. The ALJ found that these payments were "catch-up" wage payments as the Help Foundation was in arrears. D. & O. at 19. Because the Respondents recognize, and reported, these monies as wages, their argument does not affect our wage calculation. Administrator's Exhibits K, H, I.

[66] *Doyle*, slip op. at 16. The ARB has applied *Doyle* to back pay awards under the INA. *E.g.*, *Mao*, slip op. at 11; *Amtel Group of Florida, Inc. v. Yongmahapakorn (Rung)*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op at 12-13 (ARB Sept. 29, 2006); *Innawalli v. Am. Info. Tech. Corp.,* ARB No. 04-165, ALJ No. 2004-LCA-013, slip op. at 8 (ARB Sept. 29, 2006).

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

[68] *Id.* at 18.

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*.[69]

The Help Foundation did not effect a "*bona fide* termination" of its employment relationship with Salaria. Rather, their employment relationship continued until USCIS's November 4, 2005 revocation of the Petition for a Nonimmigrant Worker that the Respondents filed with USCIS.

The ALJ did not consider whether the Hope Foundation had effected a "*bona fide* termination" of its employment relationship with Salaria under the INA in accordance with 20 C.F.R. § 655.731(c)(7)(ii). 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 transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

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.[70]

While the Help Foundation informed **DOL** in September 2005 that it had terminated Salaria's employment in March 2005, it did not report this termination to **DHS,** as required. Moreover, there is no evidence that the Help Foundation tendered to Salaria the cost of his return trip home when it terminated his employment in March 2005, before the June 2007 expiration of his period of authorized employment. Therefore, we find that the Help Foundation did not effect a bona fide termination of Salaria's employment.[71]

The Administrator asserts to us that the issue whether the Help Foundation effected a bona fide termination of Salaria's employment is not before the Board.[72] But a

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

[70] *Rung,* slip op at 9-11.

[71] *Id; Mao*, slip op. at 7-10; *see* 8 U.S.C.A. § 1184(c)(5)(A) and 8 C.F.R. § 214.2(h)(4)(iii)(E) (2007).

[72] Administrator's Brief at 21 n.21.

bona fide termination of Salaria's employment would have relieved the Respondents of their liability to pay Salaria's wages. In actuality, the Help Foundation's liability to pay Salaria the required wage continued until USCIS's November 4, 2005 revocation of the Petition for a Nonimmigrant Worker that the Respondents had filed. That revocation by USCIS established an end to the Help Foundation's obligation to pay Salaria's required wage under the H-1B program.[73] But because the parties stipulated to the amount of back wages, the Administrator waived his right to pursue liability beyond that dollar amount.

CONCLUSION

The Respondents are liable to Salaria for back wages in the amount of $39,666.47. Accordingly, we **ORDER** the Respondents to pay Salaria $39,666.47 in back wages. We **AFFIRM** the ALJ's Order accordingly. Salaria is also entitled to pre- and post-judgment interest.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

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73 20 C.F.R. § 655.731(c)(7)(ii).