



In the Matter of:

MICHAL VOJTISEK-LOM

ARB CASE NO. 07-097

COMPLAINANT,

ALJ CASE NO. 2006-LCA-009

and

DATE: July 30, 2009

**ADMINISTRATOR, WAGE AND HOUR
DIVISION, EMPLOYMENT STANDARDS
ADMINISTRATION, UNITED STATES
DEPARTMENT OF LABOR,**

PROSECUTING PARTY,

v.

**CLEAN AIR TECHNOLOGIES
INTERNATIONAL, INC.,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Michal Vojtisek-Lom, *pro se*, Prague, Czech Republic

For the Prosecuting Party:

Jennifer R. Marion, Esq., Paul L. Frieden, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., and Jonathan L. Snare, Esq., *United States Department of Labor, Washington, District of Columbia*

For the Respondent:

Andrew Ivchenko, Esq., Chandler, Arizona

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act, as amended (INA or the Act).¹ Michal Vojtisek-Lom filed complaints with the United States Department of Labor's Wage and Hour Division contending that, inter alia, his former employer, Clean Air Technologies International, Inc. (Clean Air), did not pay him all of his wages during the course of his employment. In a June 18, 2007 [Recommended] Decision and Order (R. D. & O.) issued after a hearing, a Department of Labor (DOL) Administrative Law Judge (ALJ) found that Clean Air did not fully pay Vojtisek-Lom and thus violated the Act. He awarded Vojtisek-Lom back wages with interest. Clean Air appealed. We affirm.

BACKGROUND

Vojtisek-Lom, a citizen of the Czech Republic, was admitted to the master's degree program in energy resources at the University of Pittsburgh in 1996.² When the emissions testing laboratory that was promised to Vojtisek-Lom for an emissions research project became unavailable, Vojtisek-Lom invented and constructed a device which he termed a "Portable Emissions Monitoring System" (PEMS).³ The PEMS measures pollutants emitted in the exhaust of vehicles and other equipment and can be carried by one person and affixed to a vehicle or engine while that vehicle or engine is being used.⁴

Clean Air provides testing and consulting services for vehicle and engine emissions studies and manufactures and markets related equipment.⁵ Clean Air's vice president, David Miller, met Vojtisek-Lom in February 1999 through a University of Pittsburgh professor who was Vojtisek-Lom's mentor.⁶ Miller offered to manufacture and market the PEMS.⁷ Clean Air and Vojtisek-Lom executed a royalty agreement in May 1999 in which Vojtisek-Lom "assigned all rights in the [PEMS]" in exchange for

¹ 8 U.S.C.A. §§ 1101-1537 (West 2008). The INA's implementing regulations are found at 20 C.F.R. Part 655, Subparts H and I (2008).

² Hearing Transcript (T.) at 306-07.

³ T. at 272; 303-08.

⁴ T. at 50, 82-84, 272-73, 308, 373-74; Complainant's Exhibit 3; Respondent's Exhibit 40.

⁵ Respondent's Exhibit 40.

⁶ T. at 605.

⁷ T. at 606-8.

payments and royalties derived from its sale.⁸ Vojtisek-Lom testified that under this agreement, he had some obligation to help Clean Air “commercialize” the PEMS.⁹

The INA permits an employer to hire non-immigrant alien workers in “specialty occupations” to work in the United States for prescribed periods of time.¹⁰ These workers are commonly referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the specific specialty.¹¹ An employer seeking to hire an H-1B worker must obtain certification from DOL by filing a Labor Condition Application (LCA).¹² The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant.¹³ After securing the certification, and upon approval by the Department of Homeland Security’s U.S. Citizenship and Immigration Services (USCIS), the Department of State issues H-1B visas to these workers.¹⁴

Clean Air decided to hire Vojtisek-Lom under the H-1B program. On November 3, 1999, it filed an LCA, which Andrew Ivchenko, Clean Air’s then Vice President and General Counsel, signed.¹⁵ Ivchenko attested in the LCA that Clean Air would employ Vojtisek-Lom from January 2000 to December 2003 as a mechanical/design engineer at an annual salary of \$36,800.¹⁶ DOL certified the LCA.¹⁷ USCIS then approved Clean Air’s corresponding Petition for a Nonimmigrant Worker, though it authorized Vojtisek-Lom’s employment under the H-1B program for a shorter period, from February 24, 2000, to December 30, 2002.¹⁸

⁸ T. at 443-46; *see* Respondent’s Exhibit 13. The 1999 royalty agreement is not in the record.

⁹ T. at 446.

¹⁰ 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700.

¹¹ 8 U.S.C.A. § 1184(i)(1).

¹² 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731-733.

¹³ 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 732.

¹⁴ 20 C.F.R. § 655.705(a), (b).

¹⁵ Respondent’s Exhibit 49.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*; Administrator’s Exhibit 2.

The parties dispute when Vojtisek-Lom began work for Clean Air. Clean Air argues that Vojtisek-Lom started work in May 2000 and that the work he performed before he started was pursuant to the royalty agreement and not compensable under the H-1B program. Vojtisek-Lom testified that he began work March 1, 2000, as the parties had agreed he would.¹⁹ The parties also signed a second royalty agreement in May 2000 by which Vojtisek-Lom assigned and transferred to Clean Air “the entire right, title, and interest in and to” the PEMS in exchange for \$25,000 and royalties.²⁰

As to his duties, Vojtisek-Lom testified that he worked as the principal scientist responsible for “all technical and engineering and scientific aspects” in the development and testing of the PEMS device.²¹ The record indicates that Vojtisek-Lom was responsible for maintaining and repairing PEMS devices, training colleagues and educating customers on the PEMS device, programming software, marketing and promoting the PEMS, and working with colleagues on contracts between Clean Air and its customers.²²

Vojtisek-Lom testified that he had no regular work hours and pursued outside academic and professional endeavors and personal research projects during his tenure with Clean Air.²³ Miller testified that Vojtisek-Lom had no work schedule, that he “came and went as he pleased,” which “early on ... wasn’t a big deal” but “towards the tail end ... just drove me crazy.”²⁴ Even so, as of November 17, 2000, Clean Air increased Vojtisek-Lom’s annual salary to \$40,000.²⁵

Vojtisek-Lom continued to work for Clean Air through 2001 and into 2002. Clean Air wanted to extend Vojtisek-Lom’s employment beyond December 2002, the end of his H-1B nonimmigrant worker status under the LCA. Consequently, Clean Air filed a second LCA on November 21, 2002, which vice president Miller signed.²⁶ This LCA indicated that Clean Air would employ Vojtisek-Lom as an environmental engineer

¹⁹ T. at 379.

²⁰ Respondent’s Exhibit 13; T. at 443-453, 620.

²¹ T. at 375-76.

²² T. at 277-92, 294-99, 318, 337, 354-64, 375-80, 382-403, 472-74; Complainant’s Exhibits 5, 10-13, 18-21, 23, 24, 30, 38; Respondent’s Exhibit 29; *see* R. D. & O. at 6.

²³ T. at 314, 315, 379.

²⁴ T. at 635-37, 687.

²⁵ Respondent’s Exhibit 49; T. at 274; R. D. & O. at 14.

²⁶ Respondent’s Exhibit 9.

from December 31, 2002, to December 31, 2005, at an annual salary of \$40,000.²⁷ DOL certified the LCA, and USCIS approved Vojtisek-Lom's H-1B status from December 31, 2002, to December 31, 2005.²⁸

Miller and John Wulf, Clean Air's fiscal manager as of February 2005, both testified that Clean Air did not always have the funds to pay its employees, including Vojtisek-Lom, or to pay its bills.²⁹ Wulf conceded that throughout the course of Vojtisek-Lom's employment, from 2000 to 2005, there were periods of time when Clean Air did not issue Vojtisek-Lom a paycheck.³⁰ And Miller acknowledged that Vojtisek-Lom regularly complained to him about not getting paid.³¹ In February 2003, Miller raised Vojtisek-Lom's annual salary to \$60,000 in an effort to dissuade him from leaving the company.³²

In addition to disagreements regarding wages, Vojtisek-Lom and Miller had disputes concerning royalties, Vojtisek-Lom's job title, ownership rights to computer software necessary to run the PEMS, and the amount of time Vojtisek-Lom was physically present at the company worksite.³³ Miller testified that as a result of these disputes, "we were seeing [Vojtisek-Lom] less and less in 2004" and "there was virtually no communication . . . when we got into 2005."³⁴ On March 16, 2005, Miller sent Vojtisek-Lom an e-mail in which he notified him that, effective immediately, he was no longer employed by Clean Air.³⁵

Vojtisek-Lom filed complaints with DOL on May 4 and July 13, 2005. He claimed that Clean Air had: (1) failed to pay him all wages due him; (2) willfully mischaracterized his work duties in order to obtain a lower corresponding prevailing wage rate; (3) retaliated against him for filing these complaints; and (4) required

²⁷ *Id.*

²⁸ *Id.*; Administrator's Exhibit 3.

²⁹ T. at 604, 642-646 (Miller); T. at 499, 522, 527, 550 (Wulf).

³⁰ T. at 522.

³¹ T. at 667-674; *see* Respondent's Exhibit 17.

³² T. at 381, 674; *see* Respondent's Exhibit 1.

³³ T. at 648, 667-674.

³⁴ T. at 675.

³⁵ Complainant's Exhibit 27.

consideration for his continued employment.³⁶ This appeal concerns only Vojtisek-Lom's claim that Clean Air failed to pay him all wages due him.

DOL's Wage and Hour Division employee Martin J. Murray investigated Vojtisek-Lom's complaints. With regard to Clean Air's alleged failure to pay all wages due from 2000 to 2005, Murray testified that he reviewed payroll and other records dating from May 2003 through March 2005. Murray explained that "standard policy" is to first investigate the year preceding the complaint's filing date and, if he finds a violation of the Act in that year, which he did, to then investigate the year prior thereto for a total of two years prior to the complaint's filing. Murray testified that he also looked at records dating beyond that two-year period. But he found that these records were not "sufficiently strong to support an assertion that there was work that was performed but not paid for and it did not appear to be sufficiently strong for us to deviate from our standard policy." He testified that he could not prove violations occurring more than two years before Vojtisek-Lom's May 4, 2005 complaint, but stated that if he had been able to, it would have been an "agency" decision whether to "compute[] back wages for that period."³⁷

As a result of the investigation, the Wage and Hour Administrator found that Clean Air owed Vojtisek-Lom \$20,076.99 in back wages for the period from September 13, 2003, to March 19, 2005.³⁸ Clean Air did not object to the Administrator's decision, but Vojtisek-Lom did, and he requested a hearing before an ALJ. The ALJ conducted a hearing on June 19, 2006, in Albany, New York, and June 21 through June 23, 2006, in Buffalo, New York.

The ALJ found that Vojtisek-Lom's May 4, 2005 complaint had been timely filed.³⁹ Like the Administrator, he found that Clean Air had not paid Vojtisek-Lom all the wages due him. But unlike the Administrator, the ALJ calculated back wages during periods from March 1, 2000, through March 31, 2005. He awarded Vojtisek-Lom \$46,955.37 with interest.⁴⁰

Clean Air appealed from the ALJ's decision and order. We issued an August 9, 2007 Notice of Intent to Review that specified four issues for review:

- (1) Whether the ALJ properly determined that the Complainant, Michal Vojtisek-Lom, timely filed a complaint for back wages based on an

³⁶ R. D. & O. at 2, 9.

³⁷ T. at 162-165.

³⁸ Administrator's Exhibits 10, 11.

³⁹ R. D. & O. at 10.

⁴⁰ *Id.* at 11-22, 27-28.

alleged underpayment of wages under both the 1999 and 2002 Labor Condition Applications;

- (2) Whether the Respondent, Clean Air Technologies, is entitled to de novo review of the ALJ's determination that it is liable for \$46,955.37 in back wages even though it did not contest before the ALJ the Administrator's determination that it owed Vojtisek-Lom \$20,076.99 in back wages;
- (3) If Clean Air Technologies is entitled to de novo review of the back wage calculation, whether the ALJ properly calculated the back wage award of \$46,955.37, and if Clean Air Technologies is not entitled to de novo review of the back wage calculation, whether the ALJ properly found that Clean Air was liable for \$26,878.38 in addition to the \$20,076.99 assessed by the Administrator; and
- (4) Whether the ALJ's award of back wages should be reduced by the costs attributable to Vojtisek-Lom's alleged wrong-doing.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has jurisdiction to review the ALJ's decision.⁴¹ 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"⁴² The ARB has plenary power to review an ALJ's factual and legal conclusions de novo.⁴³

DISCUSSION

1. The Record Supports the ALJ's Finding that Vojtisek-Lom Filed a Timely Complaint for Back Wages Under Both the 1999 and 2002 LCAs.

As noted above, the Administrator assessed back wages only for the period from September 13, 2003, to March 19, 2005, and Clean Air did not object. The ALJ, however, calculated back wages during periods from March 1, 2000, through March 31,

⁴¹ 8 U.S.C.A. § 1182(n)(2); 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).

⁴² 5 U.S.C.A. § 557(b) (West 2008).

⁴³ *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).

2005. Clean Air argues that since the first LCA expired on December 31, 2002, and since Vojtisek-Lom did not file a complaint within one year thereafter, the ALJ's assessment of back pay liability for periods covered under the first LCA was error.⁴⁴

But Vojtisek-Lom's May 4, 2005 complaint alleged Clean Air did not pay him all of the required wages due him from the beginning of his employment in 2000 through 2005. INA regulations state that a complaint must be filed "not later than 12 months after the latest date on which the alleged violation(s) were committed."⁴⁵ The ALJ found that Vojtisek-Lom's May 4, 2005 complaint was timely because it was filed within 12 months of March 2005, the last date on which Vojtisek-Lom alleges that Clean Air failed to pay his wages.⁴⁶ The record supports the ALJ's finding that Vojtisek-Lom filed a timely complaint alleging that Clean Air did not pay him wages due for periods occurring throughout his employment.

In justifying his holding that Vojtisek-Lom was entitled to back pay for not only periods between September 13, 2003, to March 19, 2005, as the Administrator found, but for the entirety of his employment, the ALJ first pointed out that INA regulations mandate that Clean Air pay Vojtisek-Lom the required wage during the entire period of authorized employment unless it effected a *bona fide* termination of that employment.⁴⁷ The ALJ found that Clean Air effected a *bona fide* termination on March 31, 2005.⁴⁸

The ALJ then relied on the Board's decision in *U.S. Dept. of Labor v. Alden Mgt. Servs., Inc.*⁴⁹ In *Alden* we held that under the Immigration Nursing Relief Act of 1989 (INRA),⁵⁰ a back pay award is calculated for the entire period of time that the complainant nurses were employed, which under INRA was a maximum of six years.⁵¹ We wrote that the nurses "should be made whole, that is, be paid the prevailing wage rate for the entire period of time in Alden's employ."⁵² Here, the ALJ correctly pointed out

⁴⁴ Petition for Review at 3-6.

⁴⁵ 20 C. F. R. § 655.806(a)(5); *see* 8 U.S.C.A. § 1182(n)(2)(A).

⁴⁶ R. D. & O. at 10; *see* 20 C.F.R. § 655.806(a)(5). *See* discussion, *infra*.

⁴⁷ *See* 20 C.F.R. § 655.731(c) (7)(ii).

⁴⁸ R. D. & O. at 21.

⁴⁹ ARB Case Nos. 00-020, -021, ALJ No. 96-ARN-3 (Aug. 30, 2002).

⁵⁰ 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(a), 1182 (m). The INRA is now the Nursing Relief for Disadvantaged Areas Act of 1999, PL 106-95, 113 Stat 1312 (November 12, 1999) (West 1999).

⁵¹ *Alden*, slip op. at 15.

that like the INRA, the INA “contains no express language limiting the period for back pay recovery for an H-1B nonimmigrant.”⁵³ Applying the *Alden* holding, the ALJ held that since Vojtisek-Lom’s H-1B visa was valid from February 24, 2000, until December 31, 2005, this time period was the maximum period for back pay recovery.⁵⁴ But since the *bona fide* termination occurred on March 31, 2005, the ALJ held that Vojtisek-Lom was entitled to back wages calculated from March 1, 2000, when he began his employment, to March 31, 2005.⁵⁵

Clean Air argues that since *Alden* involved the INRA, not the INA, the ALJ erred: “The INA, unlike the INRA, *does in fact* (emphasis added) contain express language limiting the period for back pay recovery for an H-1B nonimmigrant.”⁵⁶ This argument fails utterly because the INA itself, like the INRA, does *not* contain any language that limits the period for back pay recovery. And the pertinent INA regulation, far from limiting the period for back wage recovery, expressly permits the H-1B nonimmigrant to recover back wages for periods “prior to one year before the filing of a complaint.”⁵⁷ We find, therefore, that the ALJ did not err in applying *Alden*. Thus, the ALJ properly found that Vojtisek-Lom filed a timely complaint and is therefore entitled to collect wages not paid him during his entire employment.

2. Clean Air Is Entitled to De Novo Review of the ALJ’s Decision.

As we discussed earlier, the Wage and Hour Administrator found that Clean Air owed Vojtisek-Lom \$20,076.99 in back wages for the period from September 13, 2003, to March 19, 2005. Clean Air made a “strategic decision” not to appeal the Administrator’s decision to the ALJ.⁵⁸ Vojtisek-Lom did appeal to the ALJ, seeking

⁵² *Id.* at 16.

⁵³ R. D. & O. at 10.

⁵⁴ R. D. & O. at 10, 11.

⁵⁵ R. D. & O. at 11- 22.

⁵⁶ Petition for Review at 5.

⁵⁷ “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 assessed for a period prior to one year before the filing of a complaint.” 20 C.F.R. § 655.806(a)(5).

⁵⁸ Petition for Review at 6.

back wages for employment before 2003. The Administrator argues to us that Clean Air waived its right to have this Board review de novo the ALJ's back wage award for the September 13, 2003, to March 19, 2005 period because it failed to contest the Administrator's determination that it owed back wages for that period.⁵⁹

We reject this argument. The fact that Clean Air did not appeal to the ALJ all or a portion of the Administrator's decision pertaining to back wages has no bearing here. The relevant fact is that the ALJ issued a recommended decision and order on June 18, 2007, from which Clean Air filed a timely Petition for Review on July 16, 2007. In that Petition, Clean Air asks us to review de novo the ALJ's back wage award.⁶⁰ Since, as earlier noted and which the Administrator acknowledges, we have de novo authority to review an ALJ's findings of fact and conclusions of law in a case involving the INA, we shall exercise that authority here.

3. The Record Supports the ALJ's Finding that Clean Air Owes Vojtisek-Lom \$46,955.37.

The Legal Standard

By signing and filing the LCA, the employer represents that its contents are accurate and acknowledges and accepts its obligations under the H-1B visa program. That acceptance is re-affirmed when the employer petitions USCIS for approval of the H-1B visa application as supported by the LCA.⁶¹ By signing and filing the LCA, the employer attests that for the "entire period of authorized employment, the required wage

⁵⁹ The Administrator asserts that Clean Air did not contest before the ALJ the Administrator's determination that it owed Vojtisek-Lom wages for May through December 2003 and January 2005 through March 2005; that it only contested the Administrator's determination with respect to 2004. Administrator's Brief at 13-14. The Administrator's assertion is contrary to the record. Clean Air presented evidence at the hearing to rebut Vojtisek-Lom's allegations that it owed him certain back wages from March 2000 to March 2005. Clean Air's Post-Hearing Brief at 6-11; *see* R. D. & O. at 12-21.

The Administrator argues in the alternative that if Clean Air is entitled to de novo review of the ALJ's calculation of back wages for May 2003 to March 2005, the ALJ's findings are reasonable and should be affirmed. Administrator's Brief at 15-19. The Administrator asserts that in its Petition for Review, Clean Air does not sufficiently specify error in the ALJ's back pay calculations for May 2003 to March 2005. Administrator's Brief at 14, 15. We address these contentions later in this opinion.

⁶⁰ Petition for Review at 6-8.

⁶¹ 20 C.F.R. § 655.805(d).

rate will be paid to the H-1B nonimmigrant(s).”⁶² “Wage rate” means the remuneration (exclusive of fringe benefits) to be paid, stated in terms of amount per hour, day, month or year.⁶³ The required wage must be paid to the employee “cash in hand, free and clear, when due.”⁶⁴ An H-1B nonimmigrant, who is not in “nonproductive status” (i.e., not performing work), “shall receive the required pay beginning on the date when the nonimmigrant ‘enters into employment’ with the employer,” that is, when the nonimmigrant “first makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter.”⁶⁵

The Administrator investigates complaints filed by an aggrieved party alleging that an employer failed to meet a condition specified in the LCA or misrepresented material facts in the LCA.⁶⁶ An aggrieved party, defined at 20 C.F.R. § 655.715, is one whose interests are adversely affected by the employer’s alleged non-compliance with the LCA. The remedies for violations of the INA or its implementing regulations include payment of back wages.⁶⁷

To recap, the Wage and Hour Administrator determined that Clean Air violated the Act because it did not pay Vojtisek-Lom \$20,076.99 during periods between September 13, 2003 and March 19, 2005.⁶⁸ After Vojtisek-Lom requested a hearing, the ALJ found that Clean Air had not paid Vojtisek-Lom \$46,955.37 during periods throughout his entire employment. We read Clean Air’s brief to argue that the ALJ committed four errors in calculating the back wage liability.

When Did Vojtisek-Lom Began H-1B Employment?

First, Clean Air quarrels with the ALJ’s finding that Vojtisek-Lom began work as an H-1B employee on March 1, 2000.⁶⁹ Clean Air argues that Vojtisek-Lom began his

⁶² 20 C.F.R. § 655.731(a).

⁶³ 20 C.F.R. § 655.715.

⁶⁴ 20 C.F.R. § 655.731(c).

⁶⁵ 20 C.F.R. § 655.731(c)(6)(i).

⁶⁶ 8 U.S.C.A. § 1182(n)(2)(A).

⁶⁷ *See* 8 U.S.C.A. § 1182(n)(2)(D); 20 C.F.R. § 655.810(b).

⁶⁸ Administrator’s Exhibits 10, 11.

⁶⁹ R. D. & O. at 13.

H-1B work in May 2000; the work he performed for Clean Air in March and April was under their royalty agreement and not, as the ALJ found, under the H-1B program.⁷⁰

The ALJ noted Miller's testimony that Vojtisek-Lom did not work for Clean Air under the H-1B program until after he graduated college on April 29, 2000, and Vojtisek-Lom's contrary testimony that he resigned his position as a graduate student researcher so that he could begin his employment with Clean Air under the H-1B program on the agreed-upon date of March 1, 2000.⁷¹ The ALJ also observed that while Miller testified that the work Vojtisek-Lom performed in March and April was under the 1999 royalty agreement, Miller could not point out where that agreement required Vojtisek-Lom to work for Clean Air.⁷² Furthermore, Clean Air's payroll records show that it paid Vojtisek-Lom his wages beginning April 1, 2000.⁷³ Moreover, the ALJ found that Vojtisek-Lom's un rebutted testimony regarding the work he performed for Clean Air in March and April was credible. This testimony detailed the "activities, projects, travel, and research, [and] the amount of hours [Vojtisek-Lom] required to perform them."⁷⁴

Therefore, we find that the record supports the ALJ's conclusion that Vojtisek-Lom made himself "available for work" when he resigned his graduate student researcher position to begin working for Clean Air March 1, 2000, and that he "entered into employment" with Clean Air under the H-1B program on that date.⁷⁵ Thus, Clean Air owed Vojtisek-Lom wages as of March 1, 2000.⁷⁶

Should Clean Air Have to Pay Vojtisek-Lom for September and October 2000?

In its second assignment of error, Clean Air contends that the ALJ should not have awarded back pay for September and October 2000. The ALJ noted Vojtisek-Lom's testimony that he worked September and October and did not get paid because of "irregularities" stemming from Clean Air switching payroll systems.⁷⁷ The ALJ found

⁷⁰ Petition for Review at 9-11; Respondent's Post-Hearing Brief at 6, 7.

⁷¹ R. D. & O. at 12, 14; T. at 379, 631-632.

⁷² R. D. & O. at 12-13; T. at 631-34.

⁷³ R. D. & O. at 12; Respondent's Exhibit 49.

⁷⁴ R. D. & O. at 12-14; T. at 272-73, 379.

⁷⁵ R. D. & O. at 12, 13.

⁷⁶ The parties do not contest the ALJ's finding, R. D. & O. at 21-22, that Clean Air effected a *bona fide* termination of Vojtisek-Lom's employment on March 31, 2005, thus ending its back wage liability. See 20 C.F.R. § 655.731(c)(7)(ii).

that Clean Air did not adduce evidence contradicting this testimony and did not submit payroll records for any of its employees for these two months.⁷⁸ And despite Clean Air's argument that Vojtisek-Lom was in Australia "for his own purposes" during those months, the ALJ found no evidence that Vojtisek-Lom "was engaged in personal pursuits during this time."⁷⁹ Therefore, the ALJ held that Clean Air owed Vojtisek-Lom his salary for both September and October 2000.

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)"⁸⁰ 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 or if the H-1B nonimmigrant 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.⁸¹

Here, Clean Air reiterates its argument that since Vojtisek-Lom was in Australia for his own purposes in September and October 2000, and therefore in nonproductive status at his voluntary request and convenience, he is not owed wages for these months.⁸² But the only evidence the record contains about Vojtisek-Lom being in Australia is his testimony that he spent six weeks in Australia in June and July 2000, during which time he took a six-week course entitled "Energy Beyond 2000" and during which time Clean Air paid him his wages.⁸³ Therefore, the record fully supports the ALJ's finding that Vojtisek-Lom is entitled to back wages for September and October 2000.

Is the ALJ's Back Pay Calculation for the November 17, 2000 to February 24, 2003 Period Excessive?

For its third argument, Clean Air contends that the ALJ's calculations for Vojtisek-Lom's back pay between November 17, 2000, and February 24, 2003, are

⁷⁷ R. D. & O. at 14; T. at 354.

⁷⁸ R. D. & O. at 14; Respondent's Exhibit 49.

⁷⁹ R. D. & O. at 14.

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

⁸¹ 20 C.F.R. § 655.731(c)(7)(ii).

⁸² Petition for Review at 11.

⁸³ T. at 316, 354, 491-492; Respondent's Exhibit 49; Clean Air's Petition for Review at 11, 15; *see* R. D. & O. at 14.

excessive because the ALJ used an annual rate of \$40,000 rather than the prevailing wage of \$36,744 listed on 1999 LCA and \$37, 211 on the 2002 LCA.⁸⁴ Clean Air does not dispute that it raised Vojtisek-Lom's annual salary to \$40,000.00 effective November 17, 2000, and on February 24, 2003, raised his salary to \$60,000.00 per annum.

The enforceable wage obligation for an employer of an H-1B nonimmigrant is the "actual wage" or the "prevailing wage," whichever is greater.⁸⁵ An H-1B employer determines the prevailing wage that he lists on the LCA "on the best information available as of the time of filing the application." He is not required to use any "specific methodology," but may use any "legitimate source" of wage data, including a collective bargaining agreement.⁸⁶ "Actual wage" is the wage the employer pays to "all other individuals with similar experience and qualifications for the specific employment in question," but "[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."⁸⁷

Clean Air's argument that the ALJ erred in applying the \$40,000 rate for the period between November 17, 2000, and February 24, 2003, instead of the prevailing rates listed in the LCAs has no merit. The ALJ found that when Clean Air did pay Vojtisek-Lom during that period, it paid him at the \$40,000 rate.⁸⁸ The record clearly supports that finding.⁸⁹ The \$40,000 rate therefore is the "actual wage" that it paid Vojtisek-Lom. And since the "actual wage" was greater than the "prevailing wage," and since Clean Air is required to pay the higher of the two wages, the ALJ did not err in calculating the back wage liability for the period at the \$40,000 rate.

What Is Clean Air's Liability for 2004?

Fourth and finally, Clean Air argues that the Administrator and the ALJ miscalculated the back wage liability for 2004. The Administrator calculated that Clean Air owed Vojtisek-Lom \$6,923.10 for 2004.⁹⁰ The company points to a March 16, 2005 e-mail from Vojtisek-Lom to a colleague wherein he states that Clean Air owed him only one paycheck for 2004. Therefore, it argues that we should reduce the Administrator's calculation by \$5,769.25.⁹¹

⁸⁴ Petition for Review at 13.

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

⁸⁶ 20 C. F. R. § 655.731(a)(2).

⁸⁷ 20 C .F. R. § 655.731(a)(1).

⁸⁸ R. D. & O. at 14-17.

⁸⁹ Respondent's Exhibit 49.

⁹⁰ Administrator's Exhibit 9.

But we are reviewing the ALJ's calculations, not the Administrator's. The ALJ observed that Clean Air's 2004 payroll records were "so confused" that the most practical way to determine whether Vojtisek-Lom was underpaid in 2004 was to deduct the total wages paid him from the total wages due him.⁹² He found that Clean Air paid Vojtisek-Lom 25 bi-weekly payments of \$2307.69, a total of \$57,692.25. He then found that Clean Air did not pay Vojtisek-Lom two weeks' wages for his 2004 vacation in the Czech Republic. But since the company paid all of its employees two weeks of vacation pay, it was required to do the same for Vojtisek-Lom.⁹³ Therefore, he held that Clean Air owed Vojtisek-Lom for the one pay period covering that vacation in 2004, or \$2,307.69.⁹⁴ The record, confused though it may be, supports the ALJ's finding.

4. The ALJ's Back Pay Award Should Not Be Reduced by Vojtisek-Lom's Alleged Wrong-Doing.

In its May 5, 2006 Pre-Hearing Statement, Clean Air alleged that after they terminated Vojtisek-Lom, he kept software in contravention of the royalty agreement and kept computer codes necessary to the operation of the PEMS (the emissions monitoring machine that Vojtisek-Lom invented). Clean Air contended that because of this wrong-doing, Vojtisek-Lom should not be allowed to profit in any manner from his actions and should be denied any back pay. Clean Air alleged this wrong-doing "almost caused Clean Air to cease operating, and has caused significant, continuing harm to the business." Furthermore, citing the after-acquired evidence rule from *McKennon v. Nashville Banner Pub. Co.*,⁹⁵ Clean Air argued that the "magnitude" of Vojtisek-Lom's wrongdoing "was not fully evident to management until the Complainant was terminated and computer software experts evaluated the software. Only then was Clean Air able to determine the full scope of the reverse engineering effort required to make it operational." Nevertheless, the ALJ ruled that any evidence, after-acquired or not, concerning wrong-doing was not relevant and therefore not admissible.⁹⁶ Clean Air urges us to reverse the ALJ and order a rehearing so that it may present evidence of Vojtisek-Lom's alleged wrong-doing under the royalty agreement.⁹⁷

⁹¹ Petition for Review at 14; *see* Respondent's Exhibit 25.

⁹² R. D. & O. at 19.

⁹³ H-1B nonimmigrants are entitled to benefits such as paid vacations, stock options, and holidays that are provided to the employer's U.S. workers. *See* 20 C. F. R. §§ 655.731(c)(3), (c)(7)(ii).

⁹⁴ R. D. & O. at 19.

⁹⁵ 513 U. S. 352 (1995).

⁹⁶ T. at 28-29.

We will not do so. The ALJ did not abuse his discretion in not allowing the evidence Clean Air sought to admit because the Labor Department's jurisdiction under the INA extends only to employment relationships that arise under, or are terminated pursuant to, the INA's H-1B provisions.⁹⁸ While Clean Air may have other rights to pursue a cause of action in another forum, alleged wrong-doing by an H-1B nonimmigrant under a royalty agreement does not fall within DOL's jurisdiction.

CONCLUSION

Vojtisek-Lom timely filed a complaint seeking wages that Clean Air did not pay during periods throughout his entire employment under the H-1B program. The record supports a finding that Clean Air violated the Act when it did not pay Vojtisek-Lom the required wage during these periods. The record also supports the ALJ's finding that Clean Air's back wage liability is \$46,955.37 with interest, and Clean Air is not entitled to offset this liability because of Vojtisek-Lom's alleged wrong-doing under the royalty agreement.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

⁹⁷ Petition for Review at 17, 19-22, 25.

⁹⁸ See 8 U.S.C.A. § 1182(n) (1), (2); 20 C.F.R. §§ 655.705(a)-(b), 655.731, 655.732, 655.845; Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct, 17, 2002); *Rung*.