



**In the Matter of:**

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

**ARB CASE NO. 07-101**

**ALJ CASE NO. 2006-LCA-029**

**PROSECUTING PARTY,**

**DATE: January 7, 2010**

**v.**

**AVENUE DENTAL CARE aka  
MAHADEEP VIRK, DDS, aka  
MAHADEEP VIRK, DMD  
PUYALLUP P.S.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Prosecuting Party:***

**Joan Brenner, Esq., Paul L. Frieden, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., Gregory F. Jacob, Esq., *United States Department of Labor*, Washington, District of Columbia**

***For the Respondent:***

**Chase C. Alford, Esq., *Tousley Brain Stephens PLLC*, Seattle, Washington and P. Robert Thompson, Esq., *Thompson Immigration Law Associates*, Bellevue, Washington**

**FINAL DECISION AND ORDER**

This case arises under the Immigration and Nationality Act, as amended (INA or the Act).<sup>1</sup> Oshmi Dutta filed a complaint with the United States Department of Labor’s Wage and Hour Division (Wage and Hour) contending that his employer violated the INA. After an investigation, Wage and Hour’s Administrator determined that Dutta’s employer had violated the INA. Following a three-day hearing in January 2007, a Department of Labor (DOL) Administrative Law Judge (ALJ) affirmed the Administrator’s determination. Virk appealed. We affirm in part and reverse in part.

## BACKGROUND

Respondent Mahadeep Virk is a dentist. At all relevant times, Virk was a partner in “Avenue Dental Care” clinics in Bellevue and Everett, Washington, and owned outright the “Avenue Dental Care” clinic in Puyallup, Washington. Virk also became a partner in “Avenue Dental Care” clinics in Clackamas and Gresham, Oregon. Virk does business now as “Avenue Dental Care” and previously as “Affordable Dental Care.” Virk testified that each enterprise is a d/b/a and neither has a legal identity.<sup>2</sup> Oshmi Dutta is also a dentist. In June 2002, Virk hired Dutta to work at Avenue Dental Care, Puyallup, Washington, pursuant to the INA’s H-1B nonimmigrant worker program.<sup>3</sup> At the time of the January 2007 hearing, Dutta worked at the Avenue Dental Care clinics in Clackamas and Gresham, Oregon.<sup>4</sup>

The INA permits an employer to hire nonimmigrant alien workers in “specialty occupations” to work in the United States for prescribed periods of time.<sup>5</sup> These workers are commonly referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the specific specialty.<sup>6</sup> An employer seeking to hire an H-1B worker must obtain DOL certification by filing a Labor Condition Application (LCA).<sup>7</sup> The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant.<sup>8</sup> After securing the certification, and

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<sup>1</sup> 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2008). The INA’s implementing regulations are found at 20 C.F.R. Part 655, Subparts H and I (2009).

<sup>2</sup> Hearing Transcript (T.) at 455-466, 557; Administrator’s Exhibits 14, 15, 20, 25, 26, 37, 38, 40.

<sup>3</sup> Administrator’s Exhibits 4, 5; T. at 275, 276.

<sup>4</sup> Administrator’s Exhibits 14, 15; T. at 254.

<sup>5</sup> 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700.

<sup>6</sup> 8 U.S.C.A. § 1184(i)(1).

<sup>7</sup> 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731-733.

<sup>8</sup> 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731, 732.

upon approval by the Department of Homeland Security (DHS), the Department of State issues H-1B visas to these workers.<sup>9</sup>

“Mahadeep S Virk DBA Affordable Dental Care,” Puyallup, Washington, filed an LCA on May 7, 2002, to employ Dutta from June 1, 2002, to May 31, 2005, at \$108,000 to \$150,000 per year. Virk signed the LCA as “Owner Dentist/President.”<sup>10</sup> But by June 2003, while the LCA remained in effect, Virk and Dutta established as equal partners “Avenue Dental Care” clinics in Gresham and Clackamas, Oregon. Virk and Dutta agreed that Dutta would be responsible for the day to day operations of these clinics.<sup>11</sup> In July 2003, Dutta left Washington to work in Oregon. He drew money from the clinics to compensate himself; as of July 1, 2003, the Puyallup, Washington clinic no longer paid Dutta his H-1B wages.<sup>12</sup> Two years later, in June 2005, “Avenue Dental Care,” Puyallup, Washington, filed a second LCA to employ Dutta from June 12, 2005, to June 11, 2008, in Clackamas, Oregon, at \$108,000 per year. Virk signed the LCA as “Owner Dentist/President.”<sup>13</sup>

In 2005, conflicts developed between Dutta and Virk. Dutta complained to Virk that Virk had not compensated him as they had agreed and that Virk had not addressed cash flow and management problems at the Oregon clinics. Dutta sought to sell Virk his fifty-percent interest in each Oregon clinic, or, alternatively to negotiate a new compensation agreement.<sup>14</sup> Virk did neither.

Dutta then filed a complaint with DOL in September or October 2005.<sup>15</sup> Dutta alleged that Avenue Dental Care did not pay him H-1B wages as stipulated in the LCAs. Dutta also claimed, among other things, that Avenue Dental Care had not reimbursed him for the \$2,130 filing fee he paid for the 2002 LCA.<sup>16</sup> Roberta Sondgeroth of the Wage

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<sup>9</sup> 20 C.F.R. § 655.705(a), (b).

<sup>10</sup> Administrator’s Exhibit 4.

<sup>11</sup> Respondent’s Exhibits U, X, Y, BB, NN, AAA; T. at 361.

<sup>12</sup> Respondent’s Exhibit J; T. at 274, 310, 311.

<sup>13</sup> Administrator’s Exhibit 10.

<sup>14</sup> Respondent’s Exhibit HH.

<sup>15</sup> T. at 119.

<sup>16</sup> Dutta’s complaint is not in the record, but it is summarized in other documents. *See* Respondent’s Request for Administrative Hearing With Discovery and Testimony dated August 22, 2006, at 3-7; Avenue Dental Care Response to June 9, 2006 Request for Additional Data dated June 21, 2006.

and Hour Division investigated. As a result of the investigation, Wage and Hour's District Director found, on behalf of the Administrator, that Virk violated the INA when he (1) willfully failed to pay wages owed to Dutta; (2) failed to provide notice that he filed the LCAs; (3) required Dutta to pay a \$2,130 LCA filing fee; (4) failed to make available a public access file; (5) failed to maintain required documentation; and (6) failed to cooperate in the investigation. The Administrator ordered Virk to pay \$304,813.86 in back wages and imposed civil money penalties totaling \$4250 for willful failure to pay wages and for failure to cooperate in the investigation. The Administrator also indicated that Virk was subject to debarment from the H-1B program because his failure to pay Dutta H-1B wages was willful.<sup>17</sup>

Virk objected to the Administrator's determination and requested a hearing.<sup>18</sup> After a hearing in Seattle, Washington, from January 8-10, 2007, the ALJ issued a June 28, 2007 [Recommended] Decision and Order (R. D. & O.) in which he concluded that Virk was individually liable for the back wage the Administrator had calculated and for the filing fee Dutta had paid. He also agreed with the Administrator's assessment of \$4250 in civil money penalties and recommended that Virk be debarred for two years as a result of willfully not paying Dutta H-1B wages.<sup>19</sup> Virk appealed.

Pursuant to 20 C.F.R. § 655.845, we specified the following issues for review:

- (1) Whether the ALJ properly found that Dr. Virk was personally liable, as Dr. Dutta's employer, for any violations of the INA and its supporting regulations under the H-1B nonimmigrant worker program with respect to the LCAs signed by Virk on Dutta's behalf;
- (2) Did the ALJ properly find that the Respondent remained liable for back wages under the terms of the applicable LCA when Dutta's employment was relocated to the Oregon dental clinics, or, did Dutta terminate the employment relationship, or did Dutta assume non-productive status for reasons unrelated to employment at his own voluntary request and convenience when he became a partner in and began working at the Oregon clinics;
- (3) Whether the ALJ properly found that Virk, as the responsible employer under the LCAs, was ultimately liable for any violations, regardless of the alleged acts of malfeasance and/or fraud perpetrated by Dutta in relation to the LCAs;
- (4) If the ALJ properly found that Virk is liable for back wages, did the ALJ properly calculate those wages;

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<sup>17</sup> Administrator's Exhibit 1.

<sup>18</sup> Respondent's Request for Administrative Hearing With Discovery and Testimony dated August 22, 2006.

<sup>19</sup> *In the Matter of: Adm'r, Wage and Hour Div. v. Avenue Dental Care, aka Mahadeep Virk, DDS, aka Mahadeep Virk DMD Puyallup P.S.*, 2006-LCA-029 (ALJ June 28, 2007).

- (5) Whether the ALJ properly found that Virk was obligated to reimburse Dutta for the filing fee Dutta paid to obtain the 2002 LCA;
- (6) If the ALJ properly found that the Respondent violated the INA, did he properly find that such violation was willful.<sup>[20]</sup>

### **JURISDICTION AND STANDARD OF REVIEW**

The Administrative Review Board (ARB) has jurisdiction to review the ALJ's decision.<sup>21</sup> 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 . . . ."<sup>22</sup> The ARB has plenary power to review an ALJ's factual and legal conclusions de novo.<sup>23</sup>

### **DISCUSSION**

#### **1. Virk is Dutta's employer under the H-1B program and is liable for violating the INA.**

The INA's interpretive regulations define an H-1B nonimmigrant's "employer" as the "person, firm, contractor, or other association or organization in the United States which files a petition on behalf on an H-1B nonimmigrant."<sup>24</sup> The Administrator named "Avenue Dental Care aka Mahadeep Virk, DDS, aka Mahadeep Virk DMD Puyallup P.S." as the respondent and argues that Virk is individually liable for the alleged violations of the Act because Virk is the "employer" or, alternatively, is no more than an "alter ego" for Avenue Dental Care and Mahadeep Virk DMD Puyallup P.S. The ALJ agreed. The ALJ found that the employers listed in the LCAs, namely, "Mahadeep S Virk DBA Affordable Dental Care" (2002 LCA) and "Avenue Dental Care" (2005 LCA) were Virk's "assumed business names" and not legal entities. The ALJ also referred to Sondgeroth's testimony that Virk operates all the dental clinics as "Avenue Dental Care" and owns all or part of each one.<sup>25</sup> The ALJ further found that Virk had signed both

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<sup>20</sup> Administrative Review Board's Aug. 14, 2007 Notice of Intent to Review.

<sup>21</sup> 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).

<sup>22</sup> 5 U.S.C.A. § 557(b) (West 1996).

<sup>23</sup> *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).

<sup>24</sup> 20 C.F.R. § 655.715.

LCAs on Dutta’s behalf, “obliging himself to observe [their] terms.”<sup>26</sup> Applying 20 C.F.R. § 655.715’s definition of “employer,” the ALJ found that because Virk signed the LCAs for submission to DOL as Dutta’s sponsoring employer, Virk was Dutta’s H-1B employer.<sup>27</sup> He therefore concluded that Virk was individually liable.<sup>28</sup>

Virk contends that the “Puyallup Corporation” was Dutta’s employer because the LCAs, as well as the Petition for a Nonimmigrant Worker he filed with DHS, include that clinic’s Employer Identification Number. Virk also notes that the Administrator addressed his August 8, 2006 Determination to “Dr. Mahadeep Virk, DDS, President Mahadeep Virk DMD Puyallup P.S. d/b/a/ Avenue Dental Care” and not to Virk as an individual.<sup>29</sup> Lastly, Virk urges us to find that the ALJ erroneously relied on inapplicable law to determine who Dutta’s employer is.<sup>30</sup>

But both the regulations and the record support the ALJ’s findings that Virk is Dutta’s employer and is liable for violations of the LCAs. Virk signed the LCAs filed with DOL as Dutta’s sponsoring employer and is therefore deemed to be his employer.<sup>31</sup> And Virk himself testified that “Mahadeep S Virk DBA Affordable Dental Care” and “Avenue Dental Care,” the business entities named on the LCAs, have no legal identity.<sup>32</sup>

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<sup>25</sup> R. D. & O. at 18; T. at 106-107, 137-140; *see* Administrator’s Exhibits 14, 15.

<sup>26</sup> R. D. & O. at 18, 26; *see* Administrator’s Exhibits 4, 10.

<sup>27</sup> R. D. & O. at 16, 19.

<sup>28</sup> *Id.* at 18-19.

<sup>29</sup> Respondent’s Brief at 15-17; *see* Administrator’s Exhibits 1, 4, 5, 10.

<sup>30</sup> Respondent’s Brief at 17-18. In particular, Virk argues that the ALJ erroneously applied the definition of “employer” found in 20 C.F.R. § 655.736(b), which pertains only to “H-1B-dependent” employers. Though the ALJ may have cited and discussed this regulation, he did not rely upon it. Thus he did not err. Virk also argues that the ALJ erroneously relied upon 20 C.F.R. § 655.730(e), which describes the changes a corporation must make to its public access file when it undergoes an acquisition, merger, spin-off, or other such action. Again, however, Virk’s argument is unavailing because, though the ALJ discussed this regulation, the record contains no evidence that Avenue Dental Care, Puyallup, Washington, is a corporation or underwent an acquisition, merger, spin-off, or other such action.

<sup>31</sup> 20 C.F.R. § 655.715.

<sup>32</sup> T. at 557; Administrator’s Exhibits 4, 10; T. at 557. We agree with the Administrator that the LCA “is the determinative document” in identifying the H-1B employer and that the inclusion of an Employer Identification Number “shows only that an employer files taxes with the [Internal Revenue Service]; it does not demonstrate the legal existence of a particular corporation.” Administrator’s Brief at 21, 21 n.23.

Thus, the ALJ reasonably found that Virk’s “attempt now to claim that the employer was only the headquarters corporation is a thinly veiled and tardy attempt to change the reality of his actions . . . .”<sup>33</sup> Therefore, we conclude that Virk is Dutta’s employer and is individually liable for INA violations.

**2. Virk remained liable for wages after Dutta moved from Washington to Oregon on July 1, 2003.**

In signing and filing an LCA, an employer attests that for the entire “period of authorized employment,” it will pay the required wage to the H-1B nonimmigrant.<sup>34</sup> But the employer does not have to continue to pay wages if there has been a *bona fide* termination of the employment relationship. To effect a *bona fide* termination, the employer must notify DHS that the employment relationship has been terminated so that it may revoke approval of the H-1B visa.<sup>35</sup> Under certain circumstances, the employer must also provide the H-1B nonimmigrant with payment for transportation home.<sup>36</sup> An employer is also not required to pay wages if a nonimmigrant is in nonproductive status due to his “voluntary request or convenience,” such as when he asks to tour the U.S., or to care for a sick relative, or requests a leave of absence.<sup>37</sup>

The ALJ found that Virk did not report to DHS that he terminated Dutta’s employment and did not give Dutta the cost of transportation home. He also found that Virk did not report any change in the employment relationship when Dutta started working at the Clackamas and Gresham clinics in Oregon in July 2003. Therefore, the ALJ concluded that Virk never terminated Dutta’s employment and, thus, Dutta is entitled to his wages under the LCA.<sup>38</sup>

Virk urges us to find that when Dutta left the Puyallup, Washington clinic to move to Oregon in July 2003, the employment relationship ended because neither Virk nor the Puyallup clinic had control over Dutta’s activities. Alternatively, Virk argues that

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<sup>33</sup> R. D. & O. at 26.

<sup>34</sup> 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731(a).

<sup>35</sup> 8 U.S.C.A. § 214.2(h)(11); 20 C.F.R. § 655.731(c)(7)(ii); *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 5-6 (ARB Mar. 30, 2007); *Amtel Group of Florida, Inc. v. Yongmahapakorn*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 9-11 (ARB Sept. 29, 2006).

<sup>36</sup> 8 C.F.R. § 214.2(h)(4)(iii)(E).

<sup>37</sup> 20 C.F.R. § 655.731(c)(7)(ii).

<sup>38</sup> R. D. & O. at 19; *see* Administrator’s Exhibit 42.

even if the employment relationship still existed, Dutta voluntarily placed himself in a nonproductive status by moving to Oregon and becoming self employed.<sup>39</sup>

But these arguments fail. It is undisputed that Virk did not report to DHS that he terminated Dutta's employment and did not give Dutta the cost of transportation home. Rather, two years after Dutta moved to Oregon, Virk signed the second LCA. Thus, the employment relationship continued. The Act and its regulations impose the duty to terminate the employment relationship on the employer, not the H-1B nonimmigrant.<sup>40</sup> And there is no evidence, and Virk cites to none, that Dutta was ever in nonproductive status at his voluntary request or convenience. Therefore, Virk's liability for wages continued after Dutta's move to Oregon.

### **3. Dutta's alleged fraud does not affect Virk's liability for wages.**

Virk argued to the ALJ, and now to us, that since Dutta was a partner in the Oregon clinics, he was self employed and, thus, cannot now claim to be an H-1B nonimmigrant employee. According to Virk, Dutta should have amended the LCA or submitted a new one to reflect his July 2003 move to Oregon and his status as Virk's business partner. By not doing so, Virk contends, Dutta committed fraud and should not be entitled to recover back wages as an H-1B employee.

The ALJ, however, found that it was Virk's responsibility alone to amend the existing LCA or to file a new one. The ALJ concluded, "While Dr. Virk attempted to delegate these responsibilities to Dr. Dutta, such delegation of responsibility is clearly not permissible." Addressing Virk's assertion that Dutta provided fraudulent information in the 2005 LCA, the ALJ indicated that "any such perceived malfeasance" was not "so egregious" as to deny Dutta his wages. Accordingly, the ALJ concluded that Dutta was entitled to recover all wages due him.<sup>41</sup>

The ALJ's ruling on this issue is correct. Whether or not Dutta intended to violate U.S. immigration law by receiving money other than H-1B wages, Virk still had the duty to pay Dutta the H-1B wage stipulated in the LCAs. The INA and the regulations provide that *employers* must submit labor condition applications to DOL.<sup>42</sup> Virk signed both LCAs for submission to DOL as Dutta's employer. The employer's signature on the LCA constitutes the employer's representation of the truth of the statements on the [LCA] and acknowledges the employer's agreement to the labor condition statements (attestations) that are specifically

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<sup>39</sup> Respondent's Brief at 19-21.

<sup>40</sup> 8 U.S.C.A. § 214.2(h)(11); 20 C.F.R. § 655.731(c)(7)(ii). The Act and regulations determine Virk's continued status as Dutta's employer. Virk's argument that "the Puyallup Corporation" ceased to have control over Dutta's work when he moved to Oregon is thus inapposite.

<sup>41</sup> R. D. & O. at 21, 22.

<sup>42</sup> 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.730.



identified.<sup>43</sup> Virk testified that he signed the 2005 LCA without reading it and only later noticed that the Puyallup clinic was still listed as the employer.<sup>44</sup> But he cannot evade his obligations under the LCAs by asserting that he did not read the documents before signing. “In general, individuals are charged with knowledge of the contents of the documents they sign – that is, they have ‘constructive knowledge’ of those contents.”<sup>45</sup> Virk’s actual knowledge regarding his obligations under the LCAs is immaterial because he had constructive knowledge of the documents’ contents.<sup>46</sup> Accordingly, we find, as did the ALJ, that Dutta’s alleged fraud does not relieve Virk of his obligation to pay back wages.

#### 4. The ALJ properly determined the amount of back wages due.

The Administrator found, as did the ALJ, that Virk had not paid Dutta H-1B wages after June 30, 2003, during periods the LCAs covered.<sup>47</sup> Citing 20 C.F.R. § 655.731(c)(2)(i) and (ii), the ALJ noted that H-1B wages are the cash wages paid to the nonimmigrant as shown in the employer’s payroll records that were reported to the IRS as employee earnings with appropriate tax withholdings. Therefore, the ALJ did not credit non-payroll payments against Virk’s back wage liability to Dutta.<sup>48</sup>

Virk argues that Dutta received draws of money pursuant to his business agreement with Virk, and that even if this compensation was not H-1B wages, Dutta is not entitled to back wages as he would then receive “double” wages. Virk contends that the ALJ relied on an “overly narrow statutory interpretation of the employer’s wage payment obligation” in finding that an owner’s draw is not H-1B wages.<sup>49</sup>

The ALJ’s decision not to credit non-payroll payments is consistent with the Act, its regulations, and Board precedent. An H-1B employer must pay the H-1B

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<sup>43</sup> 20 C.F.R. § 655.730(c); *see* 20 C.F.R. §§ 655.731-734, 655.736-655.739.

<sup>44</sup> T. at 521-525.

<sup>45</sup> *Jackson*, slip op. at 3, citing *Consol. Edison Co., Inc. v. U.S.*, 221 F.3d 364, 371 (2d Cir. 2000).

<sup>46</sup> *Jackson*, slip op. at 3.

<sup>47</sup> The Administrator stipulated that Virk paid Dutta his H-1B wages through June 30, 2003. T. at 310. The Administrator modified the calculation of back wages to include all periods covered by the LCAs up to the January 2007 hearing. *See* Administrator’s Exhibits 1, 44.

<sup>48</sup> R. D. & O. at 19-20.

<sup>49</sup> Respondent’s Brief at 24-27.

nonimmigrant the higher of the prevailing wage or the actual wage.<sup>50</sup> This required wage must be paid “cash in hand, free and clear, when due.”<sup>51</sup> “‘Cash wages paid’ for purposes of satisfying the H-1B required wage shall consist only of those payments that meet all the [] criteria” set forth in 20 C.F.R. § 655.731(c)(2)(i)-(iv). Payments must be shown in the employer’s payroll records and disbursed to the employee, less authorized deductions. The employer must report the payments to the IRS as the employee’s earnings, with appropriate withholdings for taxes and deductions under the Federal Insurance Contributions Act, 26 U.S.C.A. § 3101, *et seq.* (West 1989 & Supp. 2008). And the ALJ correctly concluded that paying Dutta a share of profits under a side agreement does not constitute paying him H-1B wages. Payment of such compensation did not relieve Virk of his obligation to pay wages through the period covered by the LCAs.<sup>52</sup>

#### **5. Virk does not have to reimburse Dutta for the 2002 LCA filing fee.**

INA regulations prohibit an H-1B employer from requiring, or accepting from, an H-1B nonimmigrant the payment or remittance of the fee for filing an H-1B petition.<sup>53</sup> An aggrieved party like Dutta may file a complaint alleging a violation of the filing fee rule.<sup>54</sup> That complaint must be filed “not later than 12 months after the latest date on which the alleged violation(s) were committed.”<sup>55</sup> If an employer violates the filing fee rule, the Administrator can require the employer to return the fee to the employee.<sup>56</sup>

In the complaint that he filed in September or October 2005, Dutta alleged that after obtaining DOL certification for his 2002 LCA, he paid a \$2130 filing fee in May 2002 for his H-1B petition. He seeks reimbursement from Virk. Virk argues that since Dutta filed his claim for the filing fee more than one year after Dutta paid the fee, Dutta’s claim for reimbursement is time-barred.

The ALJ rejected Virk’s argument. For authority, he cited the INA regulation that states that the INA’s one-year statute of limitations “does not affect the scope of the

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<sup>50</sup> 8 U.S.C.A. § 1182(n)(1)(A)(i); 20 C.F.R. § 655.731(a).

<sup>51</sup> 20 C.F.R. § 655.731(c).

<sup>52</sup> *See In the Matter of Prism Enters. of Cent. Fla., Inc.*, ARB No. 01-080, ALJ No. 2001-LCA-008, slip op. at 5 (ARB Nov. 25, 2003).

<sup>53</sup> 20 C.F.R. § 655.731(c)(10)(ii).

<sup>54</sup> 20 C.F.R. § 655.806(a).

<sup>55</sup> 20 C.F.R. § 655.806(a)(5).

<sup>56</sup> 20 C.F.R. § 655.810(e)(1).

remedies” that the Administrator may assess.<sup>57</sup> He also relied on our decision in *U.S. Dept. of Labor v. Alden Mgt. Servs., Inc.*<sup>58</sup> In *Alden* we held that under the Immigration Nursing Relief Act of 1989 (INRA),<sup>59</sup> a back pay award is calculated for the entire period that nurses are employed, which under the INRA was a maximum of six years.<sup>60</sup> 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.”<sup>61</sup> Applying the *Alden* holding, the ALJ determined that “just as Dr. Dutta is entitled to back pay for the entire period he was authorized to work under this H-1B visa, he likewise is entitled to recovery of the costs and fees he incurred with his LCA.” Accordingly, the ALJ concluded that Virk must reimburse Dutta for the filing fee.<sup>62</sup>

Here the ALJ erred. Merely because Dutta’s claim for back pay is not time-barred, and thus actionable, does not mean that his claim for the filing fee is “likewise” actionable. Dutta’s claim for reimbursement of the filing fee is time-barred because it was not filed within 12 months of the date he alleges the violation occurred, namely, in May 2002 when he paid the filing fee. Our decision is *Alden*—that the INRA statute of limitation does not apply when calculating the amount of a back pay award—has no bearing here because the nurses had filed a timely claim for back pay, and the issue then became how far back in time to go in calculating the back pay they were entitled to receive. The same is true here regarding the back pay issue. Dutta’s claim for back pay is not time-barred, and he is entitled to back pay for the entire period of his H-1B employment, because Virk continued to violate the Act by not paying him right up until, and after, he filed his September-October 2005 complaint alleging non-payment. Put simply, Dutta’s complaint about back pay was timely, and thus actionable, because he filed it less than one year after Virk continued not to pay him. His filing fee claim, however, is time-barred and not actionable because the violation he alleges occurred more than one year before he filed that claim. Therefore, Virk is not required to reimburse Dutta for the filing fee.

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<sup>57</sup> R. D. & O. at 23-24; 20 C.F.R. § 655.806(a)(5).

<sup>58</sup> ARB Nos. 00-020, -021, ALJ No. 1996-ARN-003 (Aug. 30, 2002).

<sup>59</sup> 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, Pub. L. No. 106-95, 113 Stat. 1312 (Nov. 12, 1999) (West 1999).

<sup>60</sup> *Alden*, slip op. at 15.

<sup>61</sup> *Id.* at 16.

<sup>62</sup> R. D. & O. at 23-24.

## 6. Virk willfully failed to pay H-1B wages to Dutta.

The Administrator found that Virk's failure to pay wages was willful and, therefore, pursuant to 20 C.F.R. § 655.810(d)(2), recommended that Virk be debarred from participating in the H-1B program for two years. As a further consequence of Virk's willfully not paying wages, the Administrator assessed a \$3750 civil money penalty.<sup>63</sup> The ALJ agreed that Virk's failure to pay wages was willful and that Virk be debarred for two years and be assessed the civil money penalties. The ALJ relied on (1) Virk's "total failure" to investigate his responsibilities under the H-1B program; (2) the fact that Virk paid other H-1B nonimmigrants their wages and had paid Dutta's wages until July 1, 2003, thus showing Virk's understanding of the need for compliance; and (3) the fact that Virk had refused to come into compliance and pay Dutta his wages even when Sondgeroth gave him the opportunity to do so.<sup>64</sup>

Virk contends that his failure to pay H-1B wages was not willful but merely a technical violation of form over substance. Virk argues that the record contradicts the ALJ's finding that Virk's "failure to investigate any of his responsibilities under the Act" amounted to "reckless disregard for which penalties and disqualification are warranted." Virk points out that when Dutta complained to him in 2005 about not receiving his H-1B wages, Virk hired a lawyer who opined that Dutta was no longer Virk's employee. Virk also argues that the fact that he paid other H-1B nonimmigrants their wages does not show that he was aware that he needed to pay Dutta's. Rather, it shows that Virk believed that Dutta was no longer his employee. Virk also asserts that he was merely exercising his right to due process when he refused to pay Dutta's wages at the time of the investigation. Lastly, Virk asserts that he did cooperate in the investigation and provided Sondgeroth with "voluminous information" about Dutta and other H-1B nonimmigrant workers. Virk argues that Sondgeroth's finding that he did not cooperate is an unsupported conclusion.<sup>65</sup>

The Secretary of Labor may assess civil money penalties and order a two-year debarment if an H-1B employer willfully fails to pay wages.<sup>66</sup> A "'willful failure' means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to" the obligation to pay wages under the terms of the LCA.<sup>67</sup> The record

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<sup>63</sup> See 20 C.F.R. § 655.810(b)(2)(i). The Administrator also assessed a \$500 civil money penalty because Virk did not cooperate in the investigation. See 20 C.F.R. 655 § 810(b)(1)(vi).

<sup>64</sup> R. D. & O. at 25.

<sup>65</sup> Respondent's Brief at 27-30.

<sup>66</sup> 20 C.F.R. § 655.805(b).

<sup>67</sup> 20 C.F.R. § 655.805(c).

supports a finding that starting in July 2003, Virk willfully failed to pay Dutta H-1B wages.

By signing the LCAs, Virk attested that he would pay Dutta the required wages. Virk's argument that his failure to pay Dutta was due to failure of his attorneys to properly advise him or Dutta's failure to amend the LCA has no merit. Both the Administrator and the ALJ point out that an H-1B employer's ignorance of the INA's requirements or contention that noncompliance was due to an attorney or an employee will not excuse noncompliance.<sup>68</sup> And even accepting as true Virk's claim that he believed that Dutta ceased to be his employee, Virk did not verify whether this was so. The fact that Virk hired an attorney two years later in 2005 for advice regarding his wage obligation is immaterial to whether he showed a reckless disregard for the correctness of his actions in 2003. As for Virk's argument that he should not be assessed the \$500 civil money penalty for not cooperating in the Administrator's investigation, uncontroverted evidence, including Sondgeroth's testimony, shows that, far from cooperating, Virk impeded Sondgeroth's investigation because he did not maintain and did not produce the records Sondgeroth requested.<sup>69</sup>

#### CONCLUSION

For the reasons we have discussed, we conclude that Virk is individually liable to Dutta for back wages in the amount of \$304,813.86. As noted in the Administrator's August 8, 2006 Determination, this debt is subject to the assessment of interest and other charges. Virk is also individually liable for the \$4250 in civil money penalties that the Administrator assessed. The back wages and civil money penalties are due immediately and shall be remitted pursuant to 20 C.F.R. § 655.810(f). Furthermore, because Virk willfully failed to pay Dutta H-1B wages, he is debarred from participating in the H-1B program for two years. Virk is not liable for the \$2130 filing fee that Dutta paid in 2002.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

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

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<sup>68</sup> See *Administrator v. Home Mort. Co. of America, Inc.*, ALJ No. 2004-LCA-040, slip op. at 15 (ALJ Mar. 6, 2006).

<sup>69</sup> T. at 89-93, 101, 102, 108, 110-112, 152, 189-192, 194-195; see Administrator's Exhibits 35, 36.