In the Matter of:

ADMINISTRATOR, WAGE and HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

ARB CASE NO. 08-127

ALJ CASE NO. 2007-LCA-026

DATE: January 31, 2011

PROSECUTING PARTY,

v.

INTEGRATED INFORMATICS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party, Administrator, Wage and Hour Division:
Joan Brenner, Esq., Paul Frieden, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., *United States. Department of Labor,* Washington, District of Columbia

For the Respondent:
Kapali Eswaran and Ashish Kulkarni, *Integrated Informatics, Inc.*, Roswell, Georgia

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge,* Paul M. Igasaki, *Chief Administrative Appeals Judge,* and Joanne Royce, *Administrative Appeals Judge*

FINAL DECISION AND ORDER OF REMAND

This case arises under the Immigration and Nationality Act, as amended (INA or the Act).[1] Kumal Vyas filed a complaint with the United States Department of Labor's Wage and Hour Division contending that his former employer, Integrated Informatics, Inc. (Integrated), violated the INA's terms by failing to pay him all wages due him. Pursuant to a Decision and Order (D. & O.) issued July 25, 2008, a Department of Labor (DOL) Administrative Law Judge (ALJ) ordered Integrated to pay Vyas $1,018.70 in back wages. Integrated filed a petition requesting the Administrative Review Board (Board or ARB) to review the D. & O.[2] For the following reasons, the Board affirms in part and reverses in part the ALJ's D. & O.

BACKGROUND

The INA permits an employer to hire non-immigrant workers in "specialty occupations" to work in the United States for prescribed periods of time.[3] These workers are commonly referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the specific specialty.[4] An employer seeking to hire an H-1B worker must obtain DOL certification by filing a Labor Condition Application (LCA).[5] The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant.[6] After securing the certification, and upon approval by the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS), the Department of State issues H-1B visas to these workers.[7]

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1 8 U.S.C.A. §§ 1101-1537 (West 1999 & Thomson Reuters Supp. 2010). The INA's implementing regulations are found at 20 C.F.R. Part 655, Subparts H and I (2009).

2 We accept the Respondent's reply brief and supplement as filed.

3 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700.

4 8 U.S.C.A. § 1184(i)(1).

5 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731-733.

6 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 732.

7 20 C.F.R. § 655.705(a), (b).

Vyas, a citizen of India, is a computer programmer. Integrated is a medical software company located in Roswell, Georgia.[8] Integrated hired Vyas in May 2005, while Vyas was in the United States with "F-1 nonimmigrant student status."[9] Integrated subsequently employed Vyas through the INA's H-1B visa program.[10]

Integrated filed a LCA under which it employed Vyas. In the LCA, Integrated indicated that it would employ a computer programmer from June 2005 to June 2008, at $33,000 per year.[11] DOL certified the LCA.[12] Integrated then filed with USCIS a Petition for a Non-Immigrant Worker to employ Vyas. USCIS approved the petition and authorized Vyas's H-1B status for employment with Integrated from August 5, 2005, to June 5, 2008.[13]

By late 2005 Vyas had become dissatisfied with his pay and working conditions. On February 17, 2006, Vyas tendered his letter of resignation, effective March 3, 2006.[14] After he submitted his resignation letter, but prior to the resignation's effective date, Vyas travelled, on February 28, 2006, to Phoenix, Arizona with Ashish Kulkarni, Integrated's vice president, and another Integrated employee, to install a project on which Vyas had been working. While still in Phoenix, on March 3, Vyas spoke with Kapali Eswaran, Integrated's president, by telephone. Eswaran read Vyas a letter informing him that Integrated had filed a breach of contract lawsuit against him in state court.[15] Vyas asked to be rebooked on a flight home that same day, instead of returning the next day as planned. Vyas's flight was rebooked, and he left Phoenix March 3, 2006, the last day of his employment with Integrated.

Vyas filed a complaint with DOL's Wage and Hour Division after his resignation alleging that Integrated did not compensate him for overtime that he worked, that Integrated reneged on a promised pay raise, and that Integrated repeatedly delayed repaying him $1,500 that Vyas contended he had loaned to Integrated to cover the

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[8] Complainant's Exhibit 21; Respondent's Exhibits 6, 15, 42; ALJ's Decision and Order (D. & O.) at 2.

[9] Respondent's Exhibits 6, 42.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Complainant's Exhibit 19; Respondent's Exhibit 20.

[15] *See* Complainant's Exhibit 20.

processing fee Integrated had paid the Department of Homeland Security with respect to Vyas's employment.[16]

Proceedings before the Wage and Hour Division and the Office of Administrative Law Judges

Vyas filed a complaint with DOL's Wage and Hour Division on April 28, 2006. Vyas claimed that Integrated had withheld his wages and failed to repay the $1,500 loan.[17] Following investigation of Vyas's complaint, Wage and Hour determined, in June 2007, that Integrated had violated the INA when it failed to pay Vyas the proper wages. Wage and Hour found that Integrated owed $4,381.64 in back wages.[18] Integrated objected to Wage and Hour's determination and requested a hearing with the Office of Administrative Law Judges (OALJ). The Administrator, Wage and Hour, pursued the complaint and became the prosecuting party before the OALJ in this enforcement action.

The presiding ALJ held a hearing on April 17 and 18, 2008, in Atlanta, Georgia. On July 25, 2008, the ALJ issued the D. & O. finding that Integrated owed Vyas $1,018.70 in back wages. The ALJ rejected Vyas's contention that Integrated owed him repayment for a loan in connection with his employment. Instead, the ALJ found that Integrated had loaned Vyas $1,500 to assist Vyas in purchasing an automobile for which Integrated was entitled to repayment. The ALJ further determined that Integrated could recover the loan by making deductions from Vyas's wages pursuant to 20 C.F.R. § 655.731(c)(9)(iii)(E). By separate order, the ALJ also denied the parties' motions for sanctions against each other. Integrated timely appealed to the Board, challenging the ALJ's decision and related orders. On September 10, 2008, the Board issued a Notice of Intent to Review this case.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's decision.[19] 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 . . . ."[20]

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16 Respondent's Exhibit 6.

17 *Id.*

18 Complainant's Exhibit 16; Respondent's Exhibit 23.

19 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845. *See* Secretary's Order No. 1-2010, 75 Fed. Reg. 3,924-25 (Jan. 15, 2010) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

20 5 U.S.C.A. § 557(b) (West 1996).

The ARB has plenary power to review an ALJ's factual and legal conclusions de novo.[21] Additionally, the ARB reviews an ALJ's determinations on procedural issues, evidentiary rulings, and sanctions under an abuse of discretion standard, i.e., whether, in ruling as he did, the ALJ abused the discretion vested in him to preside over the proceedings.[22]

DISCUSSION

Integrated raises a number of issues on appeal, which we address in order.

Administrator's Failure to Issue a Timely Initial Decision

Before the ALJ, Integrated filed a motion to dismiss Vyas's complaint on the grounds that the Administrator had failed to timely issue the initial decision. In denying Integrated's motion, the ALJ noted that Vyas filed his complaint in April 2006, and the Administrator issued his decision more than a year later in June 2007, following the completion of his investigation.[23] The ALJ acknowledged that the applicable regulations require that "an investigation shall be conducted and a determination issued within 30 calendar days of the date of filing" of the complaint, and that the Administrator failed to meet this requirement.[24] Nevertheless, the ALJ noted, the time limits for processing an INA complaint are directional and not jurisdictional as the Board had previously held in *Administrator, WHD v. Synergy Systems, Inc.*[25] Therefore, the ALJ concluded, the Administrator's failure to meet the 30-day time period for completing his investigation and issuing an initial determination did not deprive the ALJ of jurisdiction to consider Vyas's complaint.[26]

On appeal to the Board, Integrated challenges the ALJ's ruling, contending that the ALJ erroneously denied Integrated's motion to dismiss because the Administrator admittedly did not timely issue his determination. Integrated urges us to reconsider our

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[21] *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).

[22] *See, e.g., Mao v. Nasser*, ARB No. 06-121, ALJ No. 2005-LCA-036, slip op. at 12 (ARB Nov. 26, 2008); *Chelladurai v. Infinite Solutions, Inc.*, ARB No. 03-072, ALJ No. 2003-LCA-004, slip op. at 9 (ARB April 26, 2006).

[23] Complainant's Exhibit 16; Respondent's Exhibit 23.

[24] 20 C.F.R. § 655.806(a)(3); *see also* 8 U.S.C.A. § 1182(n)(2)(B).

[25] ARB No. 04-046, ALJ No. 2003-LCA-022, slip op. at 7 (ARB June 30, 2006).

[26] D. & O. at 8.

decision in *Synergy* in light of ARB precedent involving the statute of limitations for filing an INA complaint.[27] Alternatively, Integrated argues that *Synergy* is inapplicable to this case because the Administrator's delay was too excessive to be excused.

We find neither of Integrated's arguments persuasive. Not only does the Board continue to adhere to *Synergy*, the distinction drawn by the ALJ between the requisites for meeting the statute of limitations deadline for filing a complaint with Wage and Hour and the time prescribed for rendering a decision once the complaint is filed is consistent with well-settled law. The Administrator's delay did not bar him from processing Vyas's complaint.[28] We thus affirm the ALJ's denial of Integrated's motion to dismiss the complaint based on the Administrator's delay in investigating the complaint and making his initial determination.

Integrated's Motion to Subpoena Vyas

Before the ALJ, Integrated filed a pre-hearing motion requesting that the ALJ issue a subpoena requiring Vyas to appear for deposition. The Administrator opposed the motion because the Immigration and Nationality Act does not expressly authorize administrative law judges to issue subpoenas in labor condition application cases arising under that statute. The ALJ agreed and denied the motion. Further, the ALJ found 29 C.F.R. § 18.29(a)(3)[29] inapplicable because Vyas was under no party's control.[30]

In denying Integrated's motion, the ALJ declined to follow the ARB's decision in *Childers v. Carolina Power & Light*,[31] upon which Integrated relied.[32] The ALJ

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[27] *See* e.g., *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 4-5 (ARB Mar. 30, 2007). 8 U.S.C.A. § 1182(n)(2(A); 20 C.F.R. § 655.806(a)(5).

[28] *Cyberworld v. Napolitano*, 602 F.3d 189 (3d Cir. 2010); *Synergy*, ARB No. 04-046, slip op. at 7. *See Brock v. Pierce County*, 476 U.S. 253 (1986).

[29] 29 C.F.R. § 18.29(a)(3) provides: "In any proceeding under this part the administrative law judge shall have all the powers necessary to the conduct of fair and impartial hearings, including, but not limited to [power to] compel the production of documents and appearance of witnesses in control of the parties."

[30] ALJ Ruling on Motions Filed by the Respondent (Feb. 15, 2008), Administrative Law Judge's Exhibit (ALJX) 25; D. & O. at 15.

[31] ARB No. 98-077, ALJ No. 1997-ERA-032 (ARB Dec. 29, 2000).

[32] In *Childers* the Board (Judge Brown, concurring in part and dissenting in part) held that the Energy Reorganization Act's (ERA) mandate that ALJs provide formal trial-type hearings encompasses subpoena authority. The Board also held that even if the congressional

distinguished *Childers* from this case on two grounds: (1) *Childers* arose under the Energy Reorganization Act,[33] and not the INA; and (2) the individuals sought to be subpoenaed in *Childers* were the respondent's employees, they were under the respondent's control, and thus they were subject to 29 C.F.R. § 18.29(a)(3).

On appeal, Integrated contends that the ALJ erred in denying its motion to subpoena Vyas for a pre-hearing deposition, again citing the Board's decision in *Childers* and the ALJ's authority to compel the appearances of witnesses pursuant to 29 C.F.R. § 18.29(a)(3). In support of its contention that 29 C.F.R. § 18.29(a)(3) provided the ALJ with the necessary authority to issue the requested subpoena, Integrated cites the Fourth Circuit's unpublished decision in *Immanuel v. U.S. Dept. of Labor*.[34] Integrated also asserts that the ALJ's denial of its request for a subpoena to depose Vyas pre-hearing prejudiced its case in that Vyas would have testified as to company policies.[35] The Administrator, for his part, urges the ARB to "take this opportunity to reexamine and reject" *Childers* as it "is at odds with the well established principle that an ALJ does not have the authority to issue subpoenas absent Congress's clear grant of such authority."[36]

We decline to reexamine our decision in *Childers*, as the Administrator urges us to do. Rather, we will do what we are charged to do. We will review the ALJ's ruling to determine whether he abused his discretion. Because both the ERA and the INA contain mandates that ALJs provide formal hearings in cases arising under those statutes, we reject the ALJ's decision to distinguish *Childers* on this basis.[37] Further, the *Childers* rationale was not limited in its application to only those cases in which the individual, who is the subject of the requested subpoena, is under the control of one of the parties. Nevertheless, any error the ALJ made in refusing to follow *Childers* is harmless because Vyas testified at the hearing, and Eswaran cross-examined him. Integrated thus had an opportunity to elicit Vyas's testimony, and it offers no evidence to support its assertion that it was prejudiced by its inability to depose Vyas pre-hearing. Accordingly, the facts present no due process concerns relevant to Integrated's ability to mount its defense.

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mandate to conduct formal hearings did not encompass subpoena authority, the adjudicating agency would be entitled to use subpoenas simply by virtue of the agency's discretion to choose procedural mechanisms in conducting adjudicatory hearings.

[33] 42 U.S.C.A. § 5851 (West 2003 & Supp. 2010).

[34] 139 F.3d 889 (Table), 1998 WL 129932 (4th Cir. 1998).

[35] Respondent's Brief at 20-22.

[36] Administrator's Response Brief at 17-21.

[37] *See* 42 U.S.C.A. § 5851; 8 U.S.C.A. § 1182(n)(2)(B).

In response to Integrated's second argument regarding the applicability of 29 C.F.R. § 18.29(a)(3), as the ALJ noted, this case is an enforcement action brought by DOL. There are only two parties to this action, Integrated and DOL. Further, Vyas is not an employee of either party. Therefore the ALJ correctly found that 29 C.F.R. § 18.29(a)(3) is inapplicable to this case because Vyas is not a party to this case, nor is he within the control of either party.[38] Accordingly, on this record, we hold that the ALJ did not abuse his discretion when he denied Integrated's request for a subpoena to permit Integrated to depose Vyas.

Integrated's Motions for Reimbursement of Deposition Costs and for Sanctions for Improper Conduct in Connection with Lebon's Deposition

Integrated scheduled four depositions for March 25, 2008, to take place on its premises in Roswell, Georgia.[39] The first deposition, of Christopher Mills, ran from 9:05 am to 9:45 am. The deposition of Wayne Kotowski followed, from 9:48 am to 10:35 am. Janet Campbell, who arrived late, was deposed from 10:46 am to 11:32 am.[40] The last scheduled deposition, of Jacques Lebon, Wage and Hour's investigator, did not take place because, although Lebon appeared for the deposition, he arrived late and by then Eswaran, Integrated's president who conducted the depositions on its behalf, had left.

Before the ALJ, Integrated sought reimbursement of the $185.55 it paid the court reporter for Lebon's March 25, 2008, deposition, and requested that the ALJ sanction the Administrator's counsel for Campbell's and Lebon's delayed arrivals. The ALJ found that Integrated submitted to the court a false account of the chronology of the March 25th events upon which it based its claims. The ALJ determined that Integrated falsely alleged an "enormous period of delay during the depositions" and falsely accused the Administrator's legal counsel of improper conduct in requesting the attending court reporter to record Lebon's late arrival with no one from Integrated present. The ALJ noted that the deposition transcripts, produced by the court reporter Integrated had hired, along with evidence the Administrator submitted, proved that Integrated's version of events was false. The ALJ found that after Integrated's "wildly inaccurate chronology" was exposed as false, Integrated did not explain or rebut it, but responded by attacking counsel for the exposure. The ALJ disallowed reimbursement and denied the motion for sanctions.[41]

Integrated argues on appeal that the ALJ improperly denied reimbursement of its court reporter fee based on the ALJ's personal observations of Integrated's president's

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38 ALJ Ruling on Motions Filed by the Respondent (Feb. 15, 2008) at 8, ALJX 25.

39 ALJX 31, exhibit C.

40 Complainant's Exhibits 34-36.

41 Order Denying Motions for Sanctions dated July 25, 2008, at 17-19.

competency, or lack thereof, in examining the deponents. Integrated further asserts that upon Lebon's late arrival, the Administrator's counsel reentered Integrated's premises without permission, and again asserts that the Administrator's counsel abused the discovery process by noting Lebon's arrival on the deposition record with no one from Integrated present.

The ALJ's factual findings regarding the March 25th events are consistent with our review of the record. Some twelve minutes after the third deposition concluded, at 11:44 am, Eswaran, stated for the deposition record that the parties had "been waiting for the last half hour" for Lebon to arrive for his deposition. Integrated's president announced that he was terminating the deposition in light of Lebon's failure to appear, stating that he had another meeting to attend.[42] On the record, the Administrator's counsel clarified, however, that it was 11:45 am and that the court reporter's notes should reflect that the immediately prior deposition had concluded "probably ten or 15 minutes ago."[43] Counsel explained that Lebon had had a flat tire on the way to his deposition and was expected to arrive within ten minutes, and stated, "We stand ready to take the deposition. We will wait here until he arrives and if Dr. Eswaran determines he does not wish to take the deposition then that will be his choice."[44] The parties then took "a short break" from 11:46 am to 11:52 am. Back on the record, the Administrator's counsel stated that it was then 11:53 am and Lebon had arrived at 11:50 am. He added, "Dr. Eswaran has left the building and has determined that he did not want to take the deposition at this time. We would object to seeking to take the deposition at a later time as Mr. Lebon is present and prepared to be deposed …."[45] The court reporter concluded the deposition record at 11:53 am.

The foregoing facts refute Integrated's claims that there were extended delays between depositions or that the Administrator's counsel engaged in improper conduct. Based on the record before the Board, we conclude that the ALJ did not abuse his discretion when he denied Integrated's request for reimbursement of the court reporter fees and for sanctions for counsel's alleged abuse of the discovery process.

Integrated's Challenge to the ALJ's Ruling to Proceed with the Hearing as Scheduled Even in Kotowski's Absence

Integrated next appeals from the ALJ's ruling to proceed with the hearing as scheduled despite the fact that one of the witnesses Integrated called, Wayne Kotowski, Assistant District Director, Wage and Hour Division, Atlanta, Georgia, was not available to testify. Kotowski signed the June 27, 2007 Determination Letter in which Wage and

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42 Complainant's Exhibit 37 at 3.

43 *Id.*

44 *Id.* at 3-4.

45 *Id.*

Hour found that Integrated failed to pay Vyas wages as required and that as a result Integrated owed Vyas $4,381.64.[46] In denying Integrated's request for a continuance, the ALJ noted that Kotowski was not the investigator and there was no showing that Kotowski had first-hand knowledge of facts uncovered in the investigation. In any event, the ALJ noted, the Wage and Hour Determination Letter was not binding on the ALJ, nor relevant to the ALJ's obligation to independently evaluate the evidence. The ALJ thus concluded that Kotowski was not a necessary witness and denied Integrated's request for a continuance.[47]

On appeal, Integrated contends that the ALJ's failure to insist on Kotowski's presence at the hearing prejudiced its case because, through Kotowski's testimony, Integrated would have established that, (1) Wage and Hour's determination was so imprecise as to warrant sanctioning the Administrator, and (2) $1,500 Integrated loaned to Vyas is properly deducted from wages under 20 C.F.R. § 655.731(c)(9)(ii).[48] In response, the Administrator contends that the ALJ did not abuse his discretion when he denied Integrated's motion for the requested continuance.

The conduct of trial before an ALJ is within the sound discretion of the presiding ALJ. Thus, we will not disturb an ALJ's decision in this regard absent a showing of abuse of that discretion. We concur in the ALJ's assessment of the materiality of the evidence Integrated sought to introduce through Kotowski's testimony. Moreover, on the record that is before the Board, we can find no support for Integrated's assertion that the ALJ's decision to hold the hearing as scheduled even though Kotowski was unavailable to attend prejudiced its case. Integrated deposed Kotowski twice pre-hearing, sometime before February 12, 2008, and again on March 25, 2008. Integrated could have submitted either deposition into evidence, but did not. While the February deposition was thus never entered into evidence, the Administrator did present Kotowski's March deposition at the time of the ALJ hearing.[49] Thus, it would appear that Integrated voluntarily relinquished the opportunity to present, through Kotowski's depositions, evidence that it felt critical to its case notwithstanding Kotowski's absence at the hearing. In any event, the ALJ ultimately found that Integrated's liability for back wages was far less than that set forth in the Determination Letter and, as we subsequently discuss, the ALJ's ruling on the requested $1,500 loan repayment turned on an interpretation of law for which Kotowski's testimony would have been immaterial. We thus conclude that the ALJ did

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[46] Complainant's Exhibit 16.

[47] ALJX 44, Ruling on Matters Raised during Apr. 4, 2008 Conference Call, dated Apr. 9, 2008.

[48] Respondent's Brief at 34-35.

[49] Complainant's Exhibit 35. *See* Order Denying Motions for Sanctions dated July 25, 2008, at 15, 16, 19; Hearing Transcript (Tr.) at 604.

not abuse his discretion in proceeding with the hearing in Kotowski's absence. We affirm the ALJ's denial of Integrated's motion for a continuance.

Integrated's Motion for Sanctions for Wage and Hour's Failure to Amend the Determination Letter and for Alleged Discovery Process Abuse

Integrated next contends that the ALJ erred when he denied its motion for sanctions against the Administrator for failure to amend the June 2007 Determination Letter indicating that Integrated owed Vyas $4,381.64 in back wages, and for discovery process abuse.[50] At the April 2008 hearing before the ALJ, Lebon acknowledged that he had discovered a mistake in his calculation of wages due. Lebon testified that the actual back wages were $3,992.40 for the three pay periods in question; reduced to $3,726.24 if the ALJ found that Vyas took two personal days off and presuming no deduction for the alleged $1,500 loan; further reduced to $3,041.11, if Integrated was allowed to recoup the alleged loan.[51]

Integrated bases it motion for sanctions under Federal Rule of Civil Procedure Rule 11 on the argument that by failing to amend the Determination Letter, the Administrator perpetrated a false allegation. Integrated's additional argument for sanctions is that the Administrator delayed providing certain documents during discovery. The ALJ denied the motion for sanctions. In rejecting Integrated first basis for sanctions, the ALJ opined that it was "rare and may be unique" for a respondent to seek sanctions for having its potential liability reduced. As to the discovery issue, the ALJ noted that the Administrator had previously provided the documents Integrated sought from Vyas – a description of his job duties, a copy of a cancelled paycheck, and a copy of an e-ticket for Vyas's March 3, 2006 return flight to Atlanta – which documents were thus in Integrated's possession. Therefore, the ALJ concluded that there had been no prejudice and no sanctions were warranted.[52]

Integrated contends on appeal that the ALJ misunderstood its argument in support of its motion for sanctions. Integrated explains that contrary to the ALJ's interpretation that Integrated sought sanctions because its potential liability was reduced, it sought sanctions because Wage and Hour "wrongfully accused" it of owing more back wages. Integrated also asserts that sanctions are warranted where the Administrator was "hiding" documents and that Integrated, as a result, had to spend time and money preparing a

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[50] Fed. R. Civ. P. 11.

[51] Tr. at 52-59; Complainant's Post-Hearing Brief at 26-27. The ALJ found that Vyas conceded that he took two personal days off. Order Denying Motion for Sanctions dated July 25, 2008 at 13-14.

[52] *Id.* at 13-15.

motion to "compel delivery" of the three documents in question.[53] The Administrator contends that the ALJ did not abuse his discretion in denying Integrated's motion for sanctions.[54]

The ALJ's factual findings underlying his conclusions in ruling on these motions for sanctions are consistent with the record. Lebon testified at the hearing that he discovered that he had made a mistake in calculating the amount of back wages due, and he corrected his mistake and recalculated those wages. Both parties called Lebon as a witness and cross-examined him. As a result, Wage and Hour corrected the mistaken calculation reflected in its Determination Letter. Further, the ALJ rationally rejected as unfounded Integrated's claim of abuse of discovery process and resulting prejudice. On this record, we hold that the ALJ did not abuse his discretion when he denied Integrated's motion for sanctions based on its claims of false accusation and abuse of discovery process. We affirm the ALJ's rulings.

Integrated's Challenge to ALJ's Finding that Integrated Owes Vyas Additional Wages

Integrated advances two arguments on the merits of the case. Integrated argues that the ALJ erroneously found that Vyas was due two days of wages in compensation for travel he undertook, while still in Integrated's employment, to install a computer system on which he had been working. Integrated also contends that contrary to the ALJ's finding, Integrated may deduct under 20 C.F.R. § 655.731(c)(9)(iii)(E) from Vyas's wages the entire $1,500 it loaned to Vyas. We first turn to Integrated's challenge of the ALJ's ruling that it owes Vyas two additional days' wages.

An H-1B employer's enforceable wage obligation to an H-1B employee is the "actual wage" or the "prevailing wage," whichever is greater."[55] An H-1B employer determines the prevailing wage that it 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.[56] "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."[57]

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53 Respondent's Brief at 22-29.

54 Administrator's Response Brief at 27.

55 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731(a).

56 20 C.F.R. § 655.731(a)(2).

57 20 C.F.R. § 655.731(a)(1).

Under the INA's "no benching" provisions, the employer is obligated to pay the required wages 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) . . . ."[58] But the employer does not have to continue to pay an H-1B nonimmigrant if "there has been a *bona fide* termination of the employment relationship." The employer must notify the Department of Homeland Security that the employment relationship has ended so that the Department of Homeland Security may revoke approval of the H-1B visa.[59] Additionally, the employer need not pay wages to an H-1B nonimmigrant that 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 which render him or her unable to work, such as a requested leave of absence.[60]

Integrated does not dispute that Vyas travelled to and from Phoenix on February 28, 2006, and March 3, 2006, to install a computer system on which he had been working for Integrated. The ALJ found that Integrated did not pay Vyas for these two travel days "although the travel was undertaken solely for work on the project in Phoenix."[61] The ALJ then set forth an H-1B employer's wage obligations. He concluded, "During [February 18 to March 3] [Vyas] worked for four days, two days of travel and two days working onsite for the Phoenix project. This entitled him to pay for four days during this pay period."[62] On appeal, Integrated states that the ALJ "never asked Integrated about its travel policy," which, it asserts, directs that travel time is "banked" towards personal time off and is not compensated. Integrated thus argues that Vyas is not entitled to his wages for his travel days to and from Phoenix.[63] The Administrator contends that the ALJ properly concluded that Vyas was entitled to his wages under the H-1B program for these travel days.[64]

In the LCA, Integrated attested that it would pay Vyas wages at the annual rate of $33,000 for full-time employment in accordance with the H-1B program.[65] These are the

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58 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(7)(i).

59 20 C.F.R. § 655.731(c)(7)(ii); 8 U.S.C.A. § 214.2(h)(11).

60 20 C.F.R. § 655.731(c)(7)(ii).

61 D. & O. at 6; Order denying Motions for Sanctions dated July 25, 2008 at 16.

62 D. & O. at 15, 16, 22.

63 Respondent's Brief at 18-20. Integrated never proffered its travel policy.

64 Administrator's Brief at 21-22.

65 Respondent's Exhibit 42.

attestations we enforce. Even accepting as true that Integrated's policy is not to compensate its employees for travel time, a company policy is not among the exceptions to an H-1B employer's obligation to pay H-1B nonimmigrant workers their wages. Therefore, we conclude, as did the ALJ, that Vyas is entitled to his wages for his travel days to and from Phoenix. Accordingly, we affirm the ALJ's finding that Vyas is owed two additional days of wages.

Integrated's Argument that It May Deduct the $1,500 It Loaned to Vyas

Integrated contends that it loaned $1,500 loan Vyas, which loan Vyas indicated was for a car, and the ALJ so found. However, the ALJ held that Integrated could withhold no more than 25 percent of Vyas's last three paychecks to recoup the loan, pursuant to the terms of 20 C.F.R. § 655.731(c)(9)(iii)(E). Integrated argues that it should be entitled to deduct 100 percent of the loan from Vyas's wages under 20 C.F.R. § 655.731(c)(9)(ii). Alternatively, Integrated argues that if the Board rules that the Department's authority "is inapplicable" to loans and deductions made under an agreement *outside* of the labor condition application, then the "ALJ's decision should be reversed" and that ends the inquiry as "there is no need" for the Board to rule between the two subsections at issue.[66]

DOL's jurisdiction under the INA extends only to employment relationships that arise under, or are terminated pursuant to the INA's H-1B provisions.[67] The parties signed the promissory note for the loan on July 15, 2005.[68] The record shows, however, that Vyas's period of authorized employment as an H-1B nonimmigrant worker with Integrated did not commence until August 4, 2005.[69] Therefore, we hold that this agreement falls outside the H-1B program and is beyond the ALJ's and this Board's authority under the INA to enforce. Accordingly, we reverse the ALJ's finding that Integrated may recoup the loan by making deductions from Vyas's wages.

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66 Respondent's Brief at 1, 2.

67 *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. 1-2010, 75 Fed. Reg. 3924 (Jan. 25, 2010).

68 The record contains a promissory note dated July 15, 2005, which Vyas and Eswaran apparently signed, Complainant's Exhibit 3, although Vyas asserts that the signature on the note is not his.

69 Respondent's Exhibit 42.

Assessment of Back Wages Integrated Owes Vyas

Lebon testified that Integrated would owe Vyas $3,726.24 in back wages if the ALJ ruled that Vyas was not due wages for two personal days he took off from work during the time in question and presuming no deduction for the car loan.[70] First, the ALJ ruled that Vyas was not due wages for these two personal days. No party appealed from that ruling.[71] Second, consistent with this decision, there is no deduction from wages for the car loan. Accordingly, we order Integrated to pay Vyas $3,726.24 in back wages, as calculated by Lebon, the Administrator's investigator.

CONCLUSION

Based on the foregoing, we conclude that the ALJ's denial of Integrated's motion to dismiss the complaint in light of the Administrator's delay in issuing a Determination Letter is in accordance with applicable law. The ALJ's denial of Integrated's motion to subpoena Vyas for a pre-hearing deposition is affirmed. The ALJ's denial of Integrated's motion seeking reimbursement of court reporter costs and sanctions with respect to discovery undertaken by Integrated did not constitute an abuse of the ALJ's discretion or a violation of applicable law. The ALJ's denial of Integrated's motion to continue the hearing in the absence of a witness that Integrated had called, and the ALJ's denial of Integrated's motions seeking sanctions against the Administrator, Wage and Hour Division, for failing to amend the Determination Letter issued in this case and for alleged discovery abuse, were both within the sound discretion of the ALJ and in accordance with applicable law. Notwithstanding Integrated's company policy against paying employees for time spent in travel, Vyas is entitled to the payment of two additional days' wages in accordance with the Labor Condition Application pursuant to which Vyas was issued his H-1B visa and employed by Integrated. Because we find that the $1,500 loan agreement at issue does not pertain to the parties' employment relationship under DOL's H-1B program, Integrated is not entitled to recoup the loan through deductions from Vyas's H-1B wages. Vyas is entitled to $3,726.24 in back wages.

ORDER

The Decision and Order herein appealed is **AFFIRMED IN PART**, and **REVERSED IN PART**. The Board **AFFIRMS** the ALJ's denial of Integrated's motion to dismiss the complaint because of the Wage and Hour Division's failure to timely issue its Determination Letter; **AFFIRMS** the ALJ's orders denying Integrated's motions

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[70] Tr. At 52-59.

[71] Order Denying Motion for Sanctions dated July 25, 2008 at 13-14; *see also* Complainant's Post-Hearing Brief at 26-27.

seeking reimbursement of court reporter fees, requesting a continuance of the hearing before the ALJ, and denying Integrated's various motions seeking to impose sanctions on the Administrator, Wage and Hour Division, and it legal counsel; and **AFFIRMS** the ALJ's award of the payment to Vyas of two additional days' wages. The Board **REVERSES** the ALJ's order reducing the back wages owed Vyas based on a purported $1,500 auto loan obligation of Vyas to Integrated. The Board **AFFIRMS** the ALJ's denial of Integrated's request to subpoena Vyas for a pre-hearing deposition. The Board awards Vyas $3,726.24 in back wages and orders Integrated to pay Vyas $3,726.24 in back wages.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge