



**In the Matter of:**

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

**ARB CASE NO. 09-029**

**ALJ CASE NO. 2007-LCA-013**

**PROSECUTING PARTY,**

**DATE: March 24, 2011**

**v.**

**LUNG ASSOCIATES, P.A.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Prosecuting Party, Administrator, Wage and Hour Division:*

**Joan Brenner, Esq.; Paul L. Frieden, Esq.; William C. Lesser, Esq.; Steven J. Mandel, Esq.; U.S. Department of Labor, Washington, District of Columbia**

*For the Respondent:*

**Blanca R. Sordo, Esq.; Martinez & Sordo, P.A.; Miami, Florida**

**Before: Paul M. Igasaki, Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Luis A. Corchado, Administrative Appeals Judge.**

**FINAL DECISION AND ORDER**

This case arises under the Immigration and Nationality Act, as amended (INA or the Act).<sup>1</sup> Victor Ghobrial, a physician, filed a complaint with the United States Department of Labor’s Wage and Hour Division. Ghobrial contended that his employer, Lung Associates, P.A. (Lung Associates), violated the terms of the INA by failing to pay him all wages due him and by threatening to have his non-immigrant worker status cancelled in retaliation for pursuing these wages. Pursuant to a Decision and Order dated October 23, 2008, a Department of Labor (DOL) Administrative Law Judge (ALJ) ordered Lung Associates to pay \$22,785.60 in back wages to Ghobrial. The ALJ also ordered Lung Associates to pay back wages to two other physicians it formerly employed, Jaime Avecillas (\$13,382.88) and Jose Yataco (\$14,989.24). Based on Lung Associates’s violations of the INA, the ALJ assessed \$11,850 in civil money penalties and ordered Lung Associates debarred from participating in the H-1B program for two years. Lung Associates appealed to the Administrative Review Board (ARB or Board). The ARB issued a December 16, 2008 Notice of Intent to Review, specifying the issues to be reviewed. We affirm the ALJ’s Decision and Order.

### **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.<sup>2</sup> These workers are commonly referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the relevant specialty.<sup>3</sup> An employer seeking to hire an H-1B worker must obtain DOL certification by filing a Labor Condition Application (LCA).<sup>4</sup> The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant.<sup>5</sup> 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.<sup>6</sup>

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<sup>1</sup> 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 (2010).

<sup>2</sup> 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700.

<sup>3</sup> 8 U.S.C.A. § 1184(i)(1).

<sup>4</sup> 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731-733.

<sup>5</sup> 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 732.

<sup>6</sup> 20 C.F.R. § 655.705(a), (b).

Lung Associates is a Florida medical professional association providing pulmonary/critical care, treatment for sleep disorders and internal medicine.<sup>7</sup> Lung Associates, through its president, Moonasar Rampertaap, filed LCAs between 2003 and 2006 pursuant to which it employed Ghobrial, Avecillas, and Yataco under the H-1B nonimmigrant worker program.<sup>8</sup>

Ghobrial worked for Lung Associates from August 2003 to late July 2006.<sup>9</sup> In June 2006, Ghobrial refused Rampertaap's request that he sign a new employment contract, which required that Ghobrial pay for his own health and malpractice insurance as well as work additional hours. Soon thereafter, Ghobrial found copies of letters Rampertaap wrote to immigration officials claiming Ghobrial was not reporting for work and urging cancellation of his H-1B status.<sup>10</sup> When Ghobrial confronted Rampertaap with these letters, Rampertaap told Ghobrial that if he would sign the new contract Rampertaap would intercede on his behalf with immigration officials.<sup>11</sup>

### **Proceedings before the Administrator and ALJ**

On July 24, 2006, Ghobrial filed a complaint with DOL's Wage and Hour Division. Ghobrial claimed that Lung Associates failed to pay his wages and threatened to cancel his H-1B status in retaliation for pursuing his wages.<sup>12</sup> A few days later, Ghobrial's attorney advised Lung Associates that Ghobrial considered their employment contract breached and would no longer be working for the practice.<sup>13</sup> Rampertaap then filed, in September 2006, a police report in which he alleged that Ghobrial, in August 2006, paid his personal cell phone bill from a company account.<sup>14</sup> That October, Ghobrial received from Rampertaap a written demand for \$300,000 for allegedly violating a restrictive covenant in their employment contract.<sup>15</sup>

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<sup>7</sup> Administrator's Exhibits 17, 29, 35.

<sup>8</sup> Administrator's Exhibits 5, 7, 20, 21, 39, 40, 46-48.

<sup>9</sup> Administrative Law Judge's Exhibit (ALJX) 1.

<sup>10</sup> Administrator's 18, 36, 37; Hearing Transcript (T.) at 235-38, 242, 245.

<sup>11</sup> T. at 245.

<sup>12</sup> ALJX 1.

<sup>13</sup> Administrator's Exhibit 40.

<sup>14</sup> Administrator's Exhibit 45.

<sup>15</sup> Administrator's Exhibit 16. Rampertaap sent similar demands to both Yataco and Avecillas. Administrator's Exhibits 14, 15.

In the course of its investigation of Ghobrial's complaint, Wage and Hour identified INA violations relating to Ghobrial and two other nonimmigrant employees of Lung Associates. In March 2007, Wage and Hour determined that Lung Associates violated the INA when it failed to pay wages due, and ordered the following back wages: Ghobrial (\$29,080.60); Avecillas (\$13,382.88), and Yataco (\$14,989.24).<sup>16</sup> Wage and Hour also determined, inter alia, that Lung Associates discriminated against Ghobrial when Rampertaap filed a police report against Ghobrial after learning that he had filed a complaint with Wage and Hour. Finding certain violations to be willful, Wage and Hour assessed \$13,125 in civil money penalties and determined that Lung Associates and its president, Rampertaap, were to be debarred from the H-1B program for at least two years.<sup>17</sup> Lung Associates objected to Wage and Hour's determination and requested a hearing with the Office of Administrative Law Judges. The Wage and Hour Administrator pursued the complaint and became the prosecuting party.<sup>18</sup>

The ALJ held a hearing on September 25 and 26, 2007 in St. Petersburg, Florida. On October 23, 2008, the ALJ issued the Decision and Order (D. & O.) herein appealed. The ALJ upheld the Administrator's determination except for \$1,275 in civil money penalties.<sup>19</sup> Lung Associates appealed to the Board challenging the ALJ's decision. The Administrator seeks affirmance of the ALJ's D. & O. in its entirety.

#### JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's decision.<sup>20</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>21</sup>

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<sup>16</sup> ALJX 1.

<sup>17</sup> *Id.*

<sup>18</sup> ALJX 2.

<sup>19</sup> The Deputy Administrator, Wage and Hour, has not appealed from the ALJ's rejection of \$1,275 in civil money penalties for Rampertaap's demands for money from Ghobrial, Avecillas, and Yataco after their employment ended. Administrator's Brief at 3 n.5.

<sup>20</sup> 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).

<sup>21</sup> 5 U.S.C.A. § 557(b) (West 1996).

The ARB reviews an ALJ's determinations on procedural issues, evidentiary rulings, and sanctions under an abuse of discretion standard.<sup>22</sup>

## DISCUSSION

Lung Associates raises a number of issues on appeal, which we address in the order in which Lung Associates raised them:

### **Wage and Hour's procurement of a wage determination**

The enforceable wage obligation for an H-1B employer is the "actual wage" or the "prevailing wage," whichever is greater."<sup>23</sup> "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."<sup>24</sup> 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." The employer is not required to use any "specific methodology" but may use "an independent authoritative source, or other legitimate sources of wage data."<sup>25</sup>

An H-1B employer must have and retain proper documentation in support of its LCA wage attestations.<sup>26</sup> It must have "documentation regarding its determination of the prevailing wage" including "[a] copy of the prevailing wage finding from the [source] for the occupation within the area of intended employment; or [a] copy of the prevailing wage survey for the occupation within the area of intended employment published by an independent authoritative source . . . or [a] copy of the prevailing wage survey or other source data acquired from another legitimate source of wage information that was used to make the prevailing wage determination."<sup>27</sup> The Administrator determines whether an employer has the proper documentation to support its prevailing wage attestation.

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<sup>22</sup> 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 Apr. 26, 2006).

<sup>23</sup> 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731(a).

<sup>24</sup> 20 C.F.R. § 655.731(a)(1).

<sup>25</sup> 20 C.F.R. § 655.731(a)(2).

<sup>26</sup> 20 C.F.R. § 655.731(b)(3).

<sup>27</sup> 20 C.F.R. § 655.731(b)(3)(iii)(A), (B), or (C).

The Administrator may seek an appropriate prevailing wage determination where a complaint alleges failure to pay wages and (1) the employer's documentation is "either nonexistent or is insufficient to determine the prevailing wage," (2) the Administrator "has reason to believe" that the prevailing wage obtained varies substantially from the wage prevailing for the occupation in the area of intended employment, or (3) the employer has been unable to demonstrate that the prevailing wage determined by an alternate criteria is in accordance with the regulatory criteria.<sup>28</sup>

Where an ALJ determines that the Administrator's request for a wage determination was not warranted, the ALJ shall remand the case to the Administrator for further proceedings. "If there is no such determination and remand" by the ALJ, then the ALJ "shall accept as final and accurate" the wage determination obtained. "Under no circumstances shall the [ALJ] determine the validity of the wage determination."<sup>29</sup> An employer may request review of the prevailing wage determination from the issuing agency, within thirty days of receiving it.<sup>30</sup>

Sandra Kibler, Wage and Hour's investigator, discovered that Lung Associates's files lacked the requisite documentation supporting the prevailing wages it attested to in Ghobrial's, Yataco's, and Avecillas's LCAs.<sup>31</sup> Kibler noted that there was no documentation for Ghobrial or Yataco, and only a one-page job classification print-out for Avecillas.<sup>32</sup> Kibler testified that the annual prevailing wage of \$49,858 listed in Avecillas's LCA "seemed incredibly low" for a physician and in comparison to its attestations of the prevailing wage for the two other physicians.<sup>33</sup> Kibler testified that to address this discrepancy she obtained an occupational classification and prevailing wage determination from the Florida Agency for Workforce Innovation, the state workforce agency.<sup>34</sup> The Florida Agency for Workforce Innovation determined that the job classification for general internists with a prevailing annual wage between \$133,494 (2003) and \$159,973 (2006) was appropriate for the work these physicians performed.<sup>35</sup> Lung Associates did not object to the job classification and corresponding prevailing wage determination, and the Administrator relied on them to calculate back wages.

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<sup>28</sup> 20 C.F.R. § 655.731(d)(1).

<sup>29</sup> 20 C.F.R. § 655.840(c).

<sup>30</sup> 20 C.F.R. § 655.731(d)(2).

<sup>31</sup> T. at 50-51, 72, 77.

<sup>32</sup> Administrator's Exhibits 13, 20, 21, 39, 48; T. at 70-76.

<sup>33</sup> T. at 70.

<sup>34</sup> T. at 70-71.

<sup>35</sup> Administrator's Exhibit 28-33.

The ALJ found that Lung Associates’s documentation was insufficient to support Avecillas’s prevailing wage attestation and that it had no documentation to support Ghobrial’s or Yataco’s. Therefore, the ALJ concluded that Kibler’s procuring a wage determination was “warranted” under the regulations.<sup>36</sup> The ALJ also found that Lung Associates had not requested review of the wage determination in the manner prescribed by the regulations and could not challenge its validity before him.<sup>37</sup>

On appeal, Lung Associates reiterates the argument it made to the ALJ that the job classification print-out it retained for Avecillas adequately supports all of its prevailing wage attestations for all three physicians. Therefore, Lung Associates asserts, Kibler’s procurement of a wage determination was unwarranted and not appropriate.<sup>38</sup>

We find employer’s arguments unpersuasive, as did the ALJ. The record supports Kibler’s testimony that, (1) Lung Associates retained no documentation supporting its wage attestations for Ghobrial or Yataco, and (2) the print-out for Avecillas contained a prevailing wage of \$49,858, which “seemed incredibly low” to Kibler for a physician and in comparison to the prevailing wages listed for Ghobrial and Yataco who performed the same work at the same site (Bradenton, Florida).<sup>39</sup> The Employer’s argument that Avecillas’s print-out is sufficient to document all prevailing wage attestations is thus contrary to the record, and we reject it. The record shows, rather, that Lung Associates’s prevailing wage documentation was either “nonexistent” or “insufficient” under 20 C.F.R. § 655.731(d). Because the ALJ’s conclusion that Kibler’s procurement of a wage determination was “warranted” is consistent with the record and in accord with applicable law, we affirm it.

Further, Lung Associates did not request review of the wage determination below and cannot do so here.<sup>40</sup> Consequently, we do not further address its pertinent arguments.

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<sup>36</sup> D. & O. at 12, 13; *see* 20 C.F.R. §§ 655.731(b)(3), (d), 655.840(c).

<sup>37</sup> D. & O. at 12, 13; *see* 20 C.F.R. § 655.731(d)(2).

<sup>38</sup> Respondent’s Brief at 4-7.

<sup>39</sup> Administrator’s Exhibits 4 (Ghobrial’s first LCA: \$120,000), 6 (Avecillas’s LCA: \$49,858), 8 (Yataco’s LCA: \$131,830), 10 (Ghobrial’s second LCA: \$6,152.80/two weeks or \$159,972.80/year); Respondent’s Exhibit 13; T. at 50, 69-72.

<sup>40</sup> *See* 20 C.F.R. § 655.731(d)(2)(A party seeks review of the Administrator’s ruling on the validity of a wage determination before the Board of Alien Labor Certification Appeals.).

## Calculation of back wages

Lung Associates next contends that the ALJ erred when he upheld the Administrator's calculation of the amount of wages it actually paid the three physicians. An employer is obligated to pay the higher of the prevailing wage or the actual wage.<sup>41</sup> This required wage must be paid "cash in hand, free and clear, when due."<sup>42</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 Internal Revenue Service as the employee's earnings, with appropriate withholdings for taxes and deductions under the Federal Insurance Contributions Act.<sup>43</sup>

The ALJ found that the Administrator correctly calculated the back wages due Ghobrial, AVECILLAS, and Yataco. With regard to Ghobrial, the ALJ determined that Kibler properly relied on the applicable wage determination and certain higher, contracted-for wage rates. As to AVECILLAS and Yataco, the ALJ found that the Administrator properly relied on uncontradicted information Rampertaap provided showing payments to these two physicians where there were no payroll records.<sup>44</sup>

The ALJ also noted Kibler's testimony that in calculating back wages, the Administrator considered where appropriate the provision at 20 C.F.R. § 655.731(d)(4) (2004), in effect until May 11, 2005.<sup>45</sup> That regulation provided that no prevailing wage violation would be found in a case where the employer paid a wage equal to or more than 95 percent of the prevailing wage."<sup>46</sup>

Citing to 20 C.F.R. § 655.731(d)(4) (2004), Lung Associates argues that it owes Ghobrial only 95 percent of the prevailing wage for the period from August 2003 to August 2004 and AVECILLAS only 95 percent of the prevailing wage for 40 weeks during the period from August 2004 to May 2005. Applying wages paid, Lung Associates asserts that it owes Ghobrial \$6,719.71 in back wages for this period and AVECILLAS \$7,059.90 for that forty-week period. Therefore, Lung Associates contends that the

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<sup>41</sup> 8 U.S.C.A. § 1182(n)(1)(A)(i); 20 C.F.R. § 655.731(a).

<sup>42</sup> 20 C.F.R. § 655.731(c).

<sup>43</sup> 26 U.S.C.A. § 3101, *et seq.* (West 1989 & Supp. 2008); 20 C.F.R. § 655.731(c)(2).

<sup>44</sup> D. & O. at 10, 11, 13-14.

<sup>45</sup> T. at 121-24; see Administrator's Exhibits 23-25 (the Administrator's back wage calculations).

<sup>46</sup> 20 C.F.R. § 655.731(d)(4) (2004).



Administrator's higher back wage calculations for these periods are erroneous and the ALJ, in turn, erred by accepting them.<sup>47</sup>

We note that Lung Associates did not raise this argument below. Under our well-established precedent, we decline to consider arguments a party raises for the first time on appeal.<sup>48</sup> But, even if we were to address the argument, we would reject it. The record shows that for the 2003, 2004, and 2005 periods in question, Lung Associates paid Ghobrial and Avecillas less than 95 percent of the applicable prevailing wage; it underpaid them by 9 to 10 percent.<sup>49</sup> Therefore, it cannot avail itself of the former regulation and back wages are properly calculated based on 100 percent of the prevailing wage.

### **Lung Associates's liability for expenses**

An H-1B employer may make certain "authorized deductions" from an H-1B employee's wages, which include deductions that are "reasonable and customary in the occupation and/or area of employment (e.g., union dues; contributions to premium for health insurance policy covering all employees; savings or retirement fund contributions."<sup>50</sup> Certain deductions are not permitted, including "business expenses," costs connected to the performance of the H-1B program, and penalties for ceasing employment prior to the agreed-upon date.<sup>51</sup> "[A]ttorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition" are expressly defined as "business expenses."<sup>52</sup> "Where a worker is required to pay an expense, it is in effect a deduction in wages which is prohibited if it has the effect of reducing an employee's pay (after subtracting the amount of the expense) below the required wage."<sup>53</sup> An expense may be an authorized deduction, however, if it is principally for the employee's benefit.<sup>54</sup>

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<sup>47</sup> Respondent's Brief at 8.

<sup>48</sup> See *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-23, slip op. at 7 (ARB Sept. 29, 2006) and cases cited therein.

<sup>49</sup> See Administrator's Exhibits 23, 25; Administrative Law Judge's Exhibit 1.

<sup>50</sup> 20 C.F.R. § 655.731(c)(9)(i), (ii).

<sup>51</sup> 20 C.F.R. § 655.731(c)(9), (10).

<sup>52</sup> 20 C.F.R. § 655.731(c)(9)(ii); see also 8 U.S.C.A. 1182(n)(2)(C)(vi)(II).

<sup>53</sup> *Administrator, Wage & Hour Div. v. Kutty*, ARB No. 03-022, ALJ No. 2001-LCA-010 (ARB May 31, 2005) citing 65 Fed. Reg. at 80199 (2006).

<sup>54</sup> 20 C.F.R. § 655.731(c)(9)(iii)(B).

Lung Associates contends that the ALJ erred by upholding the Administrator's determination that it was liable for unreimbursed attorney's fees Yataco paid in connection with his H-1B petition (\$2,127.50) and similar attorney's fees (\$6,275) and H-1B petition processing fees (\$1,130) paid by Ghobrial. Lung Associates asserts that it did not "require" these physicians to pay their own H-1B program-related expenses. Rather, it argues, each applicant retained its own immigration counsel, who also advised them on matters outside the H-1B program including "their respective J-1 [visa] waivers." Lung Associates also asserts that the filing of the H-1B petition benefitted the applicants not Lung Associates.<sup>55</sup>

Lung Associates's arguments lack merit. Where attorney fees and other costs connected to the preparation and filing of the H-1B petition are specifically considered to be a business expense of the employer, we reject Lung Associates's contention that it should not be responsible for paying such fees. By virtue of their J-1 visa, Ghobrial and Yataco were entitled to enter the United States for graduate medical training. Upon completion of that training, they had to fulfill, unless waived, a two-year foreign residency requirement.<sup>56</sup> Lung Associates's attempt to distinguish legal services rendered in procuring those waivers from legal services rendered in employing Ghobrial and Yataco must fail. Only upon receiving a J-1 waiver is a nonimmigrant alien J-1 visa holder eligible to obtain an H-1B visa.<sup>57</sup> Because Ghobrial and Yataco had to obtain a J-1 waiver before Lung Associates could employ them, the Administrator's determination and the ALJ's finding that their legal costs are employer's business expenses is consistent with the Act and regulations.<sup>58</sup> Therefore, we affirm the ALJ's conclusion that Lung Associates is liable for Ghobrial's and Yataco's unreimbursed legal costs.

### **Civil money penalties and debarment**

The Act provides that the Administrator may assess civil money penalties up to \$1,000 for non-willful violations such as failure to pay wages and up to \$5,000 for willful violations or for discrimination.<sup>59</sup> The Administrator assessed civil money penalties of \$2,375 for employer's willful misrepresentation of Ghobrial's rate of pay in his second

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<sup>55</sup> Respondent's Brief at 9-11. This last assertion is unavailing where Lung Associates sought to employ and did employ Ghobrial, Yataco, and Avecillas through the H-1B program and received the benefit of their labor.

<sup>56</sup> See 8 U.S.C.A. § 1182(e).

<sup>57</sup> 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 8 U.S.C.A. § 1184(i)(1), (i)(1)(B), (D)(ii).

<sup>58</sup> *Kutty*, ARB No. 03-022, slip op. at 1-2, 11, 12.

<sup>59</sup> 8 U.S.C.A. § 1182(n)(2)(C)(i)-(ii); 20 C.F.R. § 655.810(b)(1)-(2)(i)-(iii).

LCA; \$2,375 per violation for willfully failing to pay Ghobrial's and Yataco's required wage; \$475 for requiring or accepting from Ghobrial payment of a petition fee; \$4,250 for discrimination against Ghobrial, and \$425 per violation for requiring or attempting to require payment of a penalty from Ghobrial, Yataco, and Avecillas for ceasing employment prior to the agreed upon date. The Administrator thus assessed a total of \$13,125 in civil money penalties.<sup>60</sup>

The regulation at 20 C.F.R. § 655.810(c) specifies seven factors that may be considered in determining the amount of the civil money penalties to be assessed. They are as follows: (1) previous history of H-1B program violations by the employer; (2) the number of workers affected by the violation(s); (3) the gravity of the violation(s); (4) the employer's good faith efforts to comply; (5) the employer's explanation of the violation(s); (6) the employer's commitment to future compliance, and (7) the employer's financial gain due to the violation(s) or potential financial loss, potential injury, or adverse effect to other parties.

Considering these factors, the ALJ upheld the Administrator's assessment of civil money penalties for these willful violations of the Act, with the exception of the \$425 per violation (or \$1,275) for requiring or attempting to require payment of a penalty from Ghobrial, Yataco, and Avecillas for ceasing employment prior to the agreed upon date. The ALJ thus ordered Lung Associates to pay \$11,850 in civil money penalties (\$13,125 - \$1,275 = \$11,850). Based on Lung Associates's willful violation to pay the required wages to Ghobrial and Yataco, one of the willful violations mandating its debarment for "at least two years," the ALJ ordered Lung Associates debarred from participating in the H-1B program for two years.<sup>61</sup>

Lung Associates argues that the Administrator and the ALJ found that its failure to pay Ghobrial and Yataco certain wages was "willful," without considering that it had relied on documents counsel provided to support its job classification, that it was misled by the job classification, that its payment of bonuses and extra pay for the physicians' covering for other physicians is evidence of a good faith effort to comply with its wage obligations, and in July 2006 it was negotiating with Ghobrial the terms of his future employment.<sup>62</sup>

A review of the record shows that the Administrator did not find this violation "willful" based on Lung Associates's failure to sufficiently support its job classification and wage attestations. Rather, the ALJ found a willful failure to pay Ghobrial at the appropriate wage rate during his last weeks of employment in July 2006, as well as a

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<sup>60</sup> Administrator's Exhibits 23-25, 51; Administrative Law Judge's Exhibit 1.

<sup>61</sup> Administrator's Exhibits 23-25, 51; Administrative Law Judge's Exhibit 1; *see* D. & O. at 15-22. 20 C.F.R. § 655.810(b)(2), (d)(2).

<sup>62</sup> Respondent's Brief at 12, 13.

willful failure to pay Yataco any wages for his final two weeks and three days of employment.<sup>63</sup> Moreover, the fact that Lung Associates paid bonuses or extra money for covering other physicians is irrelevant where the ALJ properly found that this money does not qualify as “wages paid” under the H-1B program.<sup>64</sup> Even accepting as true Rampertaap’s assertions that he and Ghobrial were in negotiations in July 2006, and he withheld Yataco’s wages in an attempt to recover expenses, neither relieved Lung Associates of its obligation to pay wages. Based on the foregoing, we hold that the ALJ properly determined that Lung Associates’s failure to pay wages to Ghobrial and Yataco was “willful,” one of the willful violations mandating its debarment.

### **Rampertaap’s representation of Lung Associates before the ALJ**

Rampertaap entered his appearance for Lung Associates at the outset of the hearing. The ALJ advised him that he had the right to be represented by counsel and asked Rampertaap whether he was aware of that right. Rampertaap indicated that he was. The ALJ then stated that while the Labor Department does not mandate representation by an attorney, “an attorney would be of assistance in cases like this.” The ALJ asked Rampertaap whether it was his desire to proceed without counsel, and he indicated that it was and that he was “willing to present my facts.”<sup>65</sup>

Rampertaap recognizes that 29 C.F.R. § 18.34 (2010) allows a non-lawyer, such as he is, to represent Lung Associates before the ALJ. Rampertaap argues, however, that the ALJ erred by not inquiring as to his qualification to render legal advice. Rampertaap asserts that the ALJ put Lung Associates at a disadvantage by allowing Rampertaap to represent the company.<sup>66</sup>

These arguments asserted by Lung Associates, which is represented by counsel before us, must fail. The Rules of Practice and Procedure at 29 C.F.R. Part 18 are applicable to hearings before the ALJ on complaints alleging violations of the H-1B program.<sup>67</sup> These rules provide that that any party has the right to appear at the hearing in person, by counsel, or by other representative including a non-lawyer.<sup>68</sup> Rampertaap’s representation at the hearing was in keeping with these rules. Contrary to Lung Associates’s assertion, the ALJ was under no obligation to question Rampertaap as to his

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<sup>63</sup> Administrator’s Exhibits 24, 25, 51; Administrative Law Judge’s Exhibit 1; *see* D. & O. at 16-17.

<sup>64</sup> 20 C.F.R. § 655.731(c)(2); D. & O. at 14.

<sup>65</sup> D. & O. at 5, 6.

<sup>66</sup> Respondent’s Brief at 17-19.

<sup>67</sup> 20 C.F.R. § 655.825.

<sup>68</sup> 29 C.F.R. § 18.34(a), (g)(2).

qualifications. Therefore, we find no error in the fact that the ALJ accepted Rampertaap's representation of Lung Associates at the hearing.

### **CONCLUSION**

Based on the foregoing, we conclude that the ALJ properly ordered Lung Associates to pay Ghobrial \$22,785.60, AVECILLAS \$13,382.88, Yataco \$14,989.24, and the Labor Department \$11,850 in civil money penalties, with pre- and post-judgment interest on all back wages. Further, we conclude that the ALJ properly ordered Lung Associates debarred for a period of two years for willful violations of the INA.

### **ORDER**

The ALJ's Decision and Order is **AFFIRMED**.

**SO ORDERED.**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**