



**In the Matter of:**

**DONGSHENG HUANG,**

**ARB CASE NOS. 09-056  
09-044**

**COMPLAINANT,**

**ALJ CASE NO. 2008-LCA-011**

**v.**

**DATE: March 31, 2011**

**ULTIMO SOFTWARE SOLUTIONS, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Dongsheng Huang, *pro se*, Houston, Texas**

*For the Respondent:*

**Manpreet Singh Gahra, Esq., Berkeley, California**

**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> Dongsheng Huang filed a complaint with the United States Department of Labor's Wage and Hour Division (Wage and Hour). Huang contended that his employer, Ultimo Software Solutions, Inc., violated the INA's terms by not paying his wages and seeking revocation of his visa status in retaliation for filing a complaint and cooperating in the ensuing investigation. Pursuant to a Decision and Order dated December 17, 2008, a Department of Labor (DOL) Administrative Law Judge (ALJ) determined that Ultimo did not effect a bona fide termination of Huang's employment and was liable for back

<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).

wages. The ALJ ordered Ultimo to pay Huang, (1) wages until the September 15, 2008 expiration of his authorized period of employment; (2) compensation for health care benefits and retirement plan contributions, and (3) reimbursement of litigation travel costs. Both Huang and Ultimo appealed. We agree with the ALJ and summarily affirm his Decision and Order (D. & O.). We thus limit our comments to the most determinative points.

## 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>

We have carefully reviewed the record and find that it supports the ALJ’s recitation of facts and resolution of conflicting evidence.<sup>7</sup> We summarize these facts briefly. Ultimo is a computer consulting and software development company headquartered in San Jose, California. Ultimo hired Huang under the H-1B program as a programmer analyst. Huang arrived at Ultimo on March 22, 2006.<sup>8</sup> Ultimo’s president, Subhash Pasumarthy, claimed he was dissatisfied with Huang’s computer and English

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<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).

<sup>7</sup> D. & O. at 8-14.

<sup>8</sup> Respondent’s Exhibit 1; Hearing Transcript (T.) at 18. DOL certified the LCA, and USCIS then approved Ultimo’s application for H-1B status for Huang, from December 20, 2005, to September 15, 2008. Respondent’s Exhibits 1, 6. Ultimo attested that it would pay Huang \$60,000 per year. Complainant’s Exhibit 3 at 3-16; *see* Respondent’s Exhibit 6.

language skills.<sup>9</sup> Pasumarthy told Huang to move to Houston, Texas where Huang's brother lived; Huang moved on June 4, 2006. Huang testified that Pasumarthy arranged for an Ultimo employee to pay his airfare.<sup>10</sup> Ultimo sent Huang on interviews and continued to market him for projects, but he received no projects.<sup>11</sup> Huang later asked for his wages and health care benefits, but Pasumarthy did not respond.<sup>12</sup>

Huang filed a complaint for wages in October 2006 and April 2007.<sup>13</sup> Wage and Hour investigated. On July 12, 2007, two days after the investigator told Ultimo's operations director, Lance Jensen, that Huang had filed the complaint and retained H-1B status, Ultimo notified USCIS that it had terminated Huang's employment.<sup>14</sup> On November 30, 2007, the investigator informed Huang, incorrectly, that USCIS had revoked his H-1B status that August.<sup>15</sup> On December 6, 2007, Huang filed a whistleblower complaint in which he claimed that Ultimo sought revocation of his H-1B status in retaliation for filing a complaint and participating in the investigation.<sup>16</sup>

DOL's Employment Standards Administrator found that Ultimo violated the INA. The Administrator ordered, *inter alia*, that Ultimo pay \$11,744.48 in back wages. Ultimo agreed and paid these wages.<sup>17</sup> Huang objected to the Administrator's findings and requested a hearing.

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<sup>9</sup> Ultimo asserted that Pasumarthy warned Huang of his concerns in a March 28, 2006 letter and notified him and USCIS in April that it had terminated his employment. The ALJ found, however, that Ultimo's assertions were false and these documents fabricated. The ALJ also found that Ultimo did not prove that it bought and gave to Huang an airline ticket to return to China in June 2006. Respondent's Exhibits 2-4,7; ALJ's D. & O. at 21-22, 26-27.

<sup>10</sup> Complainant's Exhibit 7 at 7 (affidavit of David Donghong Huang); T. at 30.

<sup>11</sup> Complainant's Exhibits 1 at 34-36, 78-101, 7 at 7, 8; T. at 31, 126.

<sup>12</sup> Complainant's Exhibit 1 at 102; T. at 34, 35; D. & O. at 11.

<sup>13</sup> Complainant's Exhibits 1, 4 at 3-6, 30; T. at 37, 43, 262-65.

<sup>14</sup> Respondent's Exhibit 4.

<sup>15</sup> Complainant's Exhibit 4 at 23-4, 29; T. at 49-50; D. & O. at 13. USCIS actually revoked Huang's H-1B status on December 21, 2007, Respondent's Exhibit 5, but apparently reinstated it a few days later, *see* ALJ D. & O. at 13 n.27; T. at 183, 272-91.

<sup>16</sup> Complainant's Exhibits 1, 4 at 23-4, 29; T. at 37, 43, 49-50, 262-65; D. & O. at 13.

<sup>17</sup> The Administrator calculated wages due from March 22, 2006, to June 4, 2006, at San Jose, California's prevailing annual wage rate of \$57,762. Respondent's Exhibits 8-10; Complainant's Exhibit 4 at 49, 50.

Subsequent to a hearing, the ALJ found that Ultimo never effected a bona fide termination under 20 C.F.R. § 655.731(c)(7)(ii), as it must to be relieved of its obligation to pay Huang's wages. The ALJ also found that Ultimo unlawfully retaliated against Huang under 20 C.F.R. § 655.801 because he filed a complaint and cooperated in the investigation. The ALJ ordered Ultimo to pay wages to Huang until September 15, 2008, the expiration of Huang's authorized period of employment. The ALJ also ordered compensation for health care benefits and 401K contributions, and reimbursement for litigation travel costs. Finally, the ALJ ordered Ultimo to amend its LCA to reflect that Huang was hired to work in San Jose until he was re-assigned to Houston. Both Huang (ARB No. 09-044) and Ultimo (ARB No. 09-056) appealed.

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

The Administrative Review Board has jurisdiction to review the ALJ's decision.<sup>18</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>19</sup> The ARB reviews an ALJ's determinations on procedural issues, evidentiary rulings, and sanctions under an abuse of discretion standard.<sup>20</sup>

### **DISCUSSION**

The ALJ's finding that Ultimo did not effect a bona fide termination is consistent with the record and in accordance with applicable law.<sup>21</sup> We thus affirm the ALJ's order that Ultimo pay back wages to September 15, 2008, and amend its LCA to reflect Huang's assignment to San Jose and reassignment to Houston.<sup>22</sup>

The ALJ's finding that Ultimo retaliated against Huang for filing a complaint and participating in DOL's investigation is likewise fully supported by evidence of record and

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<sup>18</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>19</sup> 5 U.S.C.A. § 557(b) (West 1996).

<sup>20</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>21</sup> 20 C.F.R. § 655.731(c)(7)(ii); *Mao*, ARB No. 06-121, slip op. at 7-10; *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>22</sup> 20 C.F.R. § 655.810(b), (b)(2). We further affirm the ALJ's awards of equitable relief. D. & O. at 32, 33.

is consistent with applicable law.<sup>23</sup> Therefore, we affirm the ALJ's conclusion that Ultimo violated the INA's employee protection provisions and its implementing regulations.

The record also supports the ALJ's determination that because Ultimo did not effect a bona fide termination of Huang's employment, it owed him compensation for health insurance benefits and pension plan contributions.<sup>24</sup> Further, the ALJ permissibly ordered Ultimo to pay Huang's litigation travel costs. Accordingly, we affirm the ALJ's orders for compensation of health insurance benefits and pension plan contributions, and reimbursement of his litigation travel costs. The ALJ's Order is affirmed in all other respects.<sup>25</sup>

### CONCLUSION

The ALJ properly found that Ultimo did not effect a bona fide termination of Huang's employment and is liable for his wages to September 15, 2008. The ALJ also properly determined that Ultimo retaliated against Huang for filing a complaint and participating in the Labor Department's investigation of that complaint. Accordingly, we **AFFIRM** the ALJ's Decision and Order awarding back pay, compensation, reimbursement of costs, and equitable relief.

**SO ORDERED.**

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

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

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

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<sup>23</sup> 8 U.S.C.A. § 1182(n)(2)(C)(iv); 20 C.F.R. §§ 655.801, 655.810(b), (b)(2); *U.S. DOL, WHD v. Kutty*, ARB No. 03-022, ALJ Nos. 2001-LCA-010 through 2001-LCA-025, slip op. at 13 (ARB May 31, 2005). Because Ultimo did not effect a "bona fide termination" of Huang's employment under 20 C.F.R. § 655.731(c)(7)(ii), its obligation to pay wages continued to September 2008, the expiration of Huang's authorized period of employment. *Mao*, ARB No. 06-121, slip op. at 9-10. The ALJ's finding of retaliation does not change that liability.

<sup>24</sup> 20 C.F.R. §§ 655.731-32, 655.820.

<sup>25</sup> Huang appeals from certain rulings the ALJ made while this matter was pending before him. We decline to discuss these discretionary rulings.