In the Matter of:

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

PROSECUTING PARTY,

and

GABRIELE WIRTH, M.D.,

v.

UNIVERSITY OF MIAMI, MILLER SCHOOL OF MEDICINE,

RESPONDENT.

ARB CASE NO. 10-090
10-093

ALJ CASE NO. 2009-LCA-026

DATE: December 20, 2011

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Gabriele Wirth, M.D., Ph.D.; *pro se*, Bologna, Italy

For the Prosecuting Party, Administrator, Wage and Hour Division:
Joan Brenner, Esq.; Jonathan M. Kronheim, Esq.; William C. Lesser, Esq.; M. Patricia Smith, Esq.; *U.S. Department of Labor,* Washington, District of Columbia

For the Respondent:
Enrique Gonzalez, III, Esq.; *Fragomen Del Rey Bernsen & Lowey, LLP,* Coral Gable, Florida

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

DECISION AND ORDER AFFIRMING, IN PART, MODIFYING, IN PART, AND REMANDING

This case arises under the Immigration and Nationality Act, as amended (INA or the Act).[1] Pursuant to a complaint filed by Dr. Gabriele Wirth, the Department of Labor's Wage and Hour Division initiated an investigation under the INA, and issued a Determination Letter on May 28, 2009, charging the University of Miami, Miller School of Medicine (the University) with, among other things, the commission of two violations of the Act. Disagreeing with the Administrator's determination, which ordered payment of back wages, the University requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ). Wirth also requested a hearing before an ALJ challenging the Administrator's determination for other reasons. In a Decision and Order issued March 31, 2010, the presiding ALJ held that the University was liable for the payment of back wages and interest. The Administrator and Wirth each timely appealed to the Administrative Review Board (ARB or Board). The University also filed a brief. For the reasons stated, we affirm the ALJ's Decision and Order, with modifications, and remand for the limited purpose of recalculating the award of pre-judgment interest to Wirth as compound interest.

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.[2] These workers are commonly referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the relevant specialty.[3] An employer seeking to hire an H-1B worker must obtain DOL certification by filing a Labor Condition Application (LCA).[4] The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant.[5] After securing the certification, and upon approval by the Department of Homeland Security's United

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1 8 U.S.C.A. §§ 1101-1537 (West 1999 & Thomson Reuters Supp. 2011). The INA's implementing regulations are found at 20 C.F.R. Part 655, Subparts H and I (2011).

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

3 8 U.S.C.A. § 1184(i)(1).

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

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

States Citizenship and Immigration Services (USCIS), the Department of State issues H-1B visas to these workers.[6]

The University is a teaching hospital in Miami, Florida. ALJ Decision and Order (D. & O.) at 48. On July 10, 2006, the University filed an original LCA to hire Wirth as a clinical anesthesiologist in teaching hospitals associated with the University at the rate of pay of $48,000.00 per year. D. & O. at 3, 48. The listed prevailing wage on the LCA was $29,830.00 per year. D. & O. at 3. The U.S. Immigration and Naturalization Service approved the LCA for the period September 1, 2006, through August 31, 2009. *Id.*

On August 27, 2006, Wirth arrived in Miami, Florida with her two children. D. & O. at 4. The earliest that the University knew of her presence in the country was on September 5, 2006, when she first contacted the University after arriving in the country. D. & O. at 38-39. The University told her that she must obtain a social security card and open a bank account for payroll purposes. D. & O. at 38. Wirth opened a bank account and applied for a social security card on September 6, 2006. D. & O. at 12, 38. Between September 6 and October 12, 2006, she also obtained a driver's license, leased an apartment, enrolled her children in school, and arranged for babysitting. D. & O. at 38-39. On October 12, 2006, Wirth announced to the University that she was available and ready to begin work. D. & O. at 39.

On March 20, 2007, Wirth received her restricted medical faculty certificate from the State of Florida. D. & O. at 4. On May 3, 2007, the University filed an amended LCA covering the employment period May 3, 2007, to May 2, 2010, in which Wirth's employment status was changed to that of "visiting assistant professor/assistant professor" with compensation identified at the rate of $96,000.00 per year. *Id.* The prevailing wage listed on the LCA was $29,830.00. *Id.* On November 9, 2007, the U.S. Immigration and Naturalization Service approved the amended LCA for the period from November 8, 2007, through May 1, 2010. *Id.*

Although "assistant professor" was designated in the amended LCA, Wirth never obtained the position. To obtain this position required the endorsement and approval of the University's Clinical Leadership Committee, the Chair of the medical department involved, the endorsement of the University's Academic Dean, and the approval of the University of Miami Provost. The evidence of record indicates that these endorsements and approvals were denied during the month of July 2007 and never obtained, and she remained a visiting assistant professor. D. & O. at 48. The evidence of record also establishes that Wirth never attained a teaching position and clinical privileges as an anesthesiologist in Miami. D. & O. at 48-49.

On July 24, 2007, the University relieved Wirth of all work-related duties and informed her that it would terminate her employment relationship with the University, effective August 31, 2007, unless she agreed to enter into an offered residency retraining program at reduced salary or elected to resign in lieu of termination for cause. D. & O. at 41-47. Wirth rejected the offer of residency training and, although there is evidence of record indicating that Wirth stated at the time that she would prefer to resign rather than complete the residency training program or face

[6] 20 C.F.R. § 655.705(a), (b).

public termination of her employment, she nevertheless did not voluntarily resign. D. & O. at 46-47. Thus, the University terminated her employment effective August 31, 2007.

At the time the University notified Wirth in July of the decision to terminate her employment, the University offered Wirth $5,000.00 toward relocation expenses, plus payment of her and her children's return coach airfare one way. D. & O. at 41. On August 16, 2007, the University again offered Wirth $5,000.00 toward relocation expenses, plus payment of her and her children's return coach airfare one way. D. & O. at 4. On October 3, 2007, the University delivered to Wirth a check for $4,355.12, representing the proffered $5,000.00 relocation expense allowance, minus applicable withheld taxes, for non-airfare costs related to her return to Germany. D. & O. at 42. No payment for the cost of airfare was made, because Wirth refused to provide the University with information as to the cost of the airfare (notwithstanding the University's repeated request to Wirth to provide such information). Wirth returned the check to the University on March 8, 2008. *Id.*

On December 12, 2007, USCIS received notice from the University that the employment relationship between the University and Wirth had been terminated. *Id.*

The University paid Wirth at the rate equivalent to $48,000.00 per year from October 16, 2006, through April 30, 2007. D. & O. at 4. From May 1, 2007, to August 31, 2007, the University paid Wirth at the rate of $96,000.00 per year. *Id.*

PROCEEDINGS BELOW

After completing the Wage & Hour investigation, the Administrator notified the University that it had committed two violations of the Act by (1) failing to pay wages for the periods September 1, 2006, through October 15, 2006, and September 1, 2007, through December 11, 2007, as required by 20 C.F.R. § 655.731, and (2) failing to provide notice of filing of LCAs in violation of 20 C.F.R. § 655.734. D. & O. at 2. The Administrator determined that the University owed Wirth $32,312.00 in back wages, and directed that the University comply with the notice of filing provisions in the future. *Id.*

Both the University and Wirth disagreed with the Administrator's determination, although for different reasons, and both respectively requested a hearing before a Department of Labor ALJ, which took place on December 15, and 16, 2009. *Id.* Pursuant to the resulting Decision and Order, the ALJ found that: (1) Wirth was not entitled to payment of wages for the period August 27, 2006, through September 4, 2006, and September 7, 2006, through October 11, 2006; (2) Wirth was entitled to payment of six days of accrued wages at the rate of $923.08 per week for the period September 4, and 5, 2006, and for October 12, 13, 14, and 15, 2006; (3) a bona fide termination of the employment relationship between Wirth and the University was complete on December 12, 2007; (4) Wirth was entitled to nine weeks and five days of accrued wages from September 1, 2007, through November 7, 2007, at the rate of $923.08 per week and to five weeks and one day of accrued wages from November 8, 2007, through December 12, 2007, at the rate of $1,846.15 per week; (5) the University established that Wirth's employment ended as a knowing, intelligent, and voluntary action on her part; (6) Wirth failed to establish

that she was entitled to a housing allowance; (7) Wirth was entitled to interest payments on past due and payable monetary wage amounts at the simple interest rate set for in 28 U.S.C. § 1961; and (8) Wirth's arguments related to representation by non-attorney V. Sciamarelli were without merit. D. & O. at 55-56.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's decision pursuant to 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845.[7] 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 . . . ."[8] The ARB has plenary power to review an ALJ's factual and legal conclusions de novo.[9] The ARB reviews an ALJ's determinations on procedural issues, evidentiary rulings, and sanctions under an abuse of discretion standard.[10]

DISCUSSION

The issues on appeal are outlined in the ARB's Notice of Intent to Review (May 28, 2010), and include: (1) whether the ALJ properly found that the Respondent was not liable for back wages from August 27, 2006, to September 4, 2006, and September 7, 2006, to October 11, 2006, because Wirth was in a voluntary non-productive status during those periods; (2) whether the ALJ properly found that the Respondent effected a bona fide termination of Wirth's employment on December 12, 2007; (3) whether the ALJ erred in finding that the Respondent was liable for back pay at the higher wage in the amended Labor Condition Application (LCA) only from the date the amended LCA was approved in November of 2007 until a bona fide termination was effected, rather than during the entire period from September 1, 2007, until a bona fide termination was effected, because the higher rate was at least the rate the Respondent paid to similarly situated employees, as required by 20 C.F.R. § 655.731(a)(1); (4) whether the ALJ properly found that the Respondent was not liable for Wirth's transportation costs for her return to her last place of foreign residence; (5) whether the ALJ properly found that Wirth is not entitled to a housing allowance; (6) whether the ALJ properly found that the issues Wirth raised

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[7] *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).

[8] 5 U.S.C.A. § 557(b) (West 1996).

[9] *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).

[10] *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).

concerning the occupation code and prevailing rate of pay for anesthesiologists are not relevant or material to this case; (7) whether the ALJ erred in assessing simple interest rather than compound interest in awarding pre-judgment interest; and (8) whether the ALJ abused his discretion and authority by refusing to permit a non-attorney to participate on Wirth's behalf at the formal hearing.

We address these issues in the order in which they are identified, beginning by summarizing the ALJ's decisions on the issues and any objections to the ALJ's decisions.[11]

Back Wages between August 27, 2006, and October 12, 2006

The ALJ found that although Wirth arrived in the United States on August 27, 2006, she did not make herself available to the employer until September 5, 2006, when she contacted the University regarding her availability. D. & O. at 39. The ALJ determined that other than for September 5, and 6, 2006, Wirth was unavailable to work for voluntary and personal reasons between August 27, 2006, and October 11, 2006. D. & O. at 39-40.

On appeal, Wirth argues that the ALJ incorrectly characterized the above-listed periods as voluntary non-productive status. Comp. Br. at 1. She argues that the University told her that she had to obtain a social security card, which took two weeks, not to simply apply for a card. Comp. Br. at 2. She also states that she used this time to apply for her Florida Medical Faculty Certificate, which she needed to work clinically. Comp. Br. at 2. She asserts that she should be paid for these periods. Comp. Br. at 3.

An H-1B worker "enters into employment" when she first makes herself available for work or otherwise comes under the control of her employer.[12] The employer is obligated to pay the worker the required wage starting thirty days after the worker arrives in the United States, even if the worker has not yet entered into employment.[13] However, the employer does not have to pay when the H-1B worker is in a nonproductive status for reasons that are not related to her employment and are not caused by her employer.[14]

The ALJ properly concluded that the University did not owe Wirth back wages from August 27, 2006, through September 4, 2006. Wirth did not contact the University to let them

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[11] In her brief, Wirth withdrew her request to review the ALJ's decision not to permit non-attorney Victor Sciamarelli to participate at the formal hearing. Comp. Br. at 30. Thus, this Decision and Remand Order does not address this issue. It is noted that in withdrawing this issue from consideration, Wirth requests that if the case is remanded to the ALJ, that she be allowed to again request the ALJ to permit Sciamarelli to participate. Comp. Br. at 30.

[12] 20 C.F.R. § 655.731(c)(6)(i).

[13] 20 C.F.R. § 655.731(c)(6)(ii).

[14] 20 C.F.R. § 655.731(c)(7)(ii).

know that she was in the country until September 5, 2006, and did not enter into employment until that day.

The ALJ also properly found that the University was obligated to pay Wirth for September 5, 2006, and September 6, 2006, because Wirth had made herself available for employment. D. & O. at 40.

Next, the ALJ found that from September 7, 2006, through October 11, 2006, the University was not obligated to pay Wirth wages because she was voluntarily unavailable. We agree with the ALJ with one significant exception.

Wirth admits that between September 7, 2006, and October 11, 2006, she opened a bank account, obtained a car lease, secured an apartment, secured a driver's license, and secured schooling and day care for her children. Comp. Br. at 1-2. Wirth also used this time to apply for her Florida Medical Faculty Certificate, which was not necessary for her to begin work; indeed, she worked for the University from October 2006 to March 20, 2007, without it. Comp. Br. at 2, 18; Ex. 57 at 2. In her testimony, Wirth stated that she told the University that she was in Florida, but that she had to get a car, a lease for the house, and babysitter. Tr. at 89. She stated that she was not completely free for work because of her personal situation and that she had to make calls and do other things for her personal situation. Tr. at 89. Before she reported to work on or around October 12, 2006, Wirth did not think that she would be able to work eight hours a day because she did not have a babysitter yet. Tr. at 95. Wirth stated in her personal statement that from September 27, 2006, until October 18, 2006, she was looking for a house, arranging babysitters, and getting a driver's license and only on October 18, 2006, did she call the University to tell them she was ready and available to work. Ex. 57 at 2. At the hearing, she changed the date that she called to report to work to October 12, or 13, 2006. Tr. at 96-97.

However, the record shows that the University told Wirth that she had to obtain her social security card before she could begin work at the University. RX 57, 61; Tr. at 86. It took two weeks for Wirth to receive her social security card after she applied for it on September 6, 2006. CX 13; Comp. Br. at 2. While we agree with the ALJ that the time that it took for Wirth to obtain the social security card was nonproductive, we disagree with the ALJ that this constituted voluntary non-productive time. Under 20 C.F.R. § 655.731(c)(7)(i), it falls under circumstances where wages must be paid. This section states that "[i]f the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer, . . ., lack of a permit or license, or any other reason . . . the employer is required to pay . . . at the required wage for the occupation listed on the LCA." We find that Wirth was in a nonproductive status because the University required her to obtain a social security card. Therefore, given Wirth's unrefuted declaration that it took two weeks for her to obtain the card, which is corroborated by the Social Security Administration's letter (CX 13) stating that it would take about two weeks for her to receive the card, the University is obligated to pay Wirth for the two-week period of September 7, 2006, to September 20, 2006.

We agree with the ALJ that Wirth was in voluntary non-productive status for the period following the two weeks it took for her to obtain her social security card, from September 21, 2006, until October 11, 2006.

Finally, the ALJ properly found that the University was obligated to pay Wirth wages beginning on October 12, 2006, because Wirth made herself available to the University on that date, and the University did not establish that she was unavailable to work after that date.

Bona Fide Termination Date

The ALJ determined that the University effected a bona fide termination on December 12, 2007, the date upon which all three actions required for bona fide termination were completed. D. & O. at 41-43. They included notice to Wirth that the employment relationship was terminated effective August 31, 2007, which occurred on July 24, 2007; the University's offer to Wirth to pay for her transportation expenses back to Germany, which occurred on July 24, 2007, and August 16, 2007; and the University's notice to USCIS that it had terminated Wirth's employment, which USCIS received on December 12, 2007. *Id.*

Wirth argues that the University never effected a bona fide termination of the employment relationship and stated that she has continually disputed this involuntary and forced resignation. Comp. Br. at 3, 15. She maintains that they never gave her notice of termination but simply stated that she resigned. Comp. Br. at 16. She states that she refused to accept a $5,000.00 check from the University because she was under the impression that acceptance of the check could be interpreted as her agreement to resign. *Id.* She asserts that the University's liability for compensation extends until the end of the second amended LCA on May 1, 2010. Comp. Br. at 17.

The University argues that it effected a bona fide termination of Wirth's employment on August 31, 2007, because the University gave Wirth actual and constructive knowledge that her employment relationship with it would end on August 31, 2007. University Br. at 14. The University, citing the Board's decision in *Administrator v. Ken Technologies*,[15] asserts that notifying USCIS of Wirth's termination is not necessary to a bona fide termination, but is only one factor to consider in determining whether a bona fide termination has occurred. University Br. at 17. In the alternative, the University argues that Wirth agreed that her employment would end on August 31, 2007, because she voluntarily resigned. University Br. at 22-23.

We hold that the ALJ properly concluded that the University complied with all of the requirements for a bona fide termination of an H-1B employment effective December 12, 2007. The H-1B regulations provide that an employer must effect a bona fide termination of the employment relationship to relieve itself of its obligation to pay the required wage.[16] To effect a bona fide termination, an employer must (1) give notice of the termination to the H-1B worker, (2) give notice to the Department of Homeland Security (USCIS), and (3) under certain

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15 ARB No. 03-140, ALJ No. 2003-LCA-015, slip op. at 4-5 (ARB Sept. 30, 2004).

16 20 C.F.R. § 655.731(c)(7)(ii).

circumstances, provide the H-1B non-immigrant with payment for transportation home.[17] The University gave Wirth notice of the termination on July 24, 2007. The University gave notice to USCIS on December 12, 2007, that it had terminated Wirth's employment.[18] Finally, the University offered return transportation (plus $5,000.00 additional for moving costs) to Wirth. D. & O. at 41-42. Although Wirth rejected the offer of payment because she was concerned that it would cut off her legal rights, this does not affect the fact that the University made the offer of payment of the cost of return transportation.

As previously noted, the University relies on language from *Ken Technologies* to support its argument that the termination of Wirth's employment did not require notifying USCIS. However, subsequent to *Ken Technologies*, the Board clarified in *Gupta* that notice to USCIS is but one of three necessary factors for concluding that an employer has effected a bona fide termination. As we held in *Gupta*, to effect a bona fide termination, the employer must take three steps, citing 20 C.F.R. § 655.731(c)(7)(ii): it must give the employee notice that the employment relationship is terminated; it must notify DHS that the employment relationship has been terminated; "[a]nd it must provide the employee with payment for transportation home under certain circumstances."[19] Thus, the University's argument that a bona fide termination occurred prior to the date the University provided notice to USCIS fails.

Back Pay Wage Rate Between September 1, 2007, and Bona Fide Termination

The ALJ found that back wages were due at the rate of $48,000.00 until the effective date of the amended LCA on November 9, 2007, after which the back wages were to be calculated at the rate of $96,000.00. D. & O. at 4, 43-44.

Wirth argues that wages from September 1, 2007, on should be paid at the rate of the second LCA because the University acknowledged and accepted its obligations under the H-1B visa program and attested that rate would be paid when it signed and filed the LCA. Comp. Br. at 18. The University appointed her a visiting assistant professor of anesthesiology with added

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[17] *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 3 (ARB Mar. 30, 2007).

[18] Wirth argues that for there to be a bona fide termination, USCIS must revoke approval of the H-1B visa after the employer notifies it that the employment relationship was terminated. Comp. Br. at 3-14. However, notice to USCIS is all that is required to fulfill the notice requirement for effecting a bona fide termination; there is no requirement that USCIS cancel the LCA for a termination to be bona fide. 20 C.F.R. § 655.731(c)(7)(ii); see *Gupta*, ARB No. 05-008, slip op. at 5-6; *Amtel Group of Florida, Inc., v. Yongmahapakorn,* ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 11 (ARB Sept. 29, 2006).

[19] *Gupta*, ARB No. 05-008, slip op. at 5. *See also Amtel Group of Florida, Inc.* ARB No. 07-104, ALJ No. 2004-LCA-006, slip op. at 2 n.4 (ARB Jan. 29, 2008); *Mao*, ARB No. 06-121, slip op. at 8.

clinical responsibilities as of May 1, 2007, and began paying her at $96,000.00 per year at that time. Comp. Br. at 18.

The Administrator argues that when the University began paying Wirth at the rate of $96,000.00 per year in early May 2007, it established an "actual rate" which was the required rate under the regulations throughout the rest of her employment, until it ended on the bona fide termination date of December 12, 2007. Administrator Br. at 4-5.

The H-1B regulations provide that the wage rate for employees is the greater of the actual wage rate or the prevailing wage rate.[20] We thus agree with the Administrator that when the University began paying Wirth at the rate of $96,000.00 per year, it established an actual rate for Wirth that continued as the appropriate wage rate until the date of her bona fide termination, and for which the University is liable. Therefore, we modify the ALJ's decision to reflect that the University owes Wirth wages from September 1, 2007, through December 12, 2007, at the rate of $96,000.00 per year.

Transportation Costs

The ALJ concluded that Wirth was not entitled to transportation costs for the return to Germany because her resignation relieved the University of this obligation. D. & O. at 44-48.

Wirth does not argue that she is entitled to transportation costs, but rather argues that she did not resign and there was never a bona fide termination of her employment. Comp. Br. at 22.

An H-1B employer is "liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to section 214(c)(5) of the Act."[21] However, if the H-1B worker "voluntarily terminates his or her employment prior to the expiration of the validity of the petition, the alien has not been dismissed."[22]

As previously discussed, we disagree with the ALJ's conclusion that Wirth voluntarily resigned. The record shows that Wirth met with the University on July 24, 2007, and the University gave her the option of submitting to a change in her employment, resignation, or termination. The fact that she declined the options that she was offered resulted in the University's July 24 notice of termination becoming effective, as the University had stated, on August 31, 2007.[23] Wirth did not have the option of continuing her employment as it existed prior to July 24, after that day. Because employers are liable under the regulations for the

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[20] 20 C.F.R. § 655.731(a).

[21] 8 C.F.R. § 214.2(h)(4)(iii)(E).

[22] *Id.*

[23] We note that if Wirth had resigned, rather than having her employment terminated, there would have been no need for the University to have effected a bona fide termination.

reasonable costs of return transportation of H-1B workers whose employment is terminated prior to the end of the authorized admission period, the University is liable for Wirth's reasonable costs of return transportation in this case. The ALJ found the reasonable value of individual coach fare from Miami, Florida to Munich, Germany, to be $1,445.00. D. & O. at 5. Therefore, even though Wirth previously declined the University's offer of payment of the costs of her return to Germany, we consider coverage of Wirth's cost of airfare for her return not waivable under the facts of this case, and hold the University liable for the payment of this cost. Accordingly, we order the University to pay Wirth $1,445.00 for her reasonable transportation cost home.[24]

Housing Allowance

The ALJ found that Wirth was not entitled to a housing allowance because the University provided housing allowances to assistant professors, not visiting assistant professors. D. &. O. at 48. The ALJ found that Wirth never attained the status of assistant professor because the Clinical Leadership Committee denied her endorsement to move to assistant professor status due to lack of demonstrated medical knowledge, skills, and abilities. *Id.*

Employers who hire H-1B workers must provide the same benefits to H-1B workers that they do to other similarly situated employees.[25] Citing this requirement, Wirth asserts that the University reimburses the housing expenses for full-time faculty and that she was hired as full-time faculty. Comp. Br. at 23. She argues that the term "visiting" is used to treat H-1B workers differently. She also asserts that pursuant to 20 C.F.R. § 655.731(a), she is entitled to a housing allowance as benefits offered because the University offered her a $10,000.00 housing allowance. *Id.*

We affirm the ALJ's conclusion that Wirth is not entitled to a housing allowance. The record shows that the Wage and Hour investigation revealed that no visiting doctors indicated that a housing allowance was included in their benefits. D. & O. at 17. Further, the evidence of record supports the ALJ's finding that assistant professors the University employed are entitled to housing allowances and relocation expenses, but visiting assistant professors are not. D. & O. at 48. Professor Lubarsky testified that the University does not offer visiting professors relocation expenses or a housing allowance. D. & O. at 27. Thus, the University met its obligation to treat Wirth as it did similarly situated employees and is not obligated to pay Wirth for her housing.

Wirth asserts that it is significant that the Wage and Hour investigator, Neira-Flor, testified that he did not have any idea of the salary paid American doctors in the position of an assistant professor of anesthesiology. D. & O. at 17. This information is not significant

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[24] Because the University was not obligated to provide Wirth with the offered $5,000 for non-airfare moving expenses, nor required to provide Wirth with the costs of air transportation for her children, our order requiring coverage of Wirth's costs of returning to Germany is limited to her one-way airfare only.

[25] 20 C.F.R. § 655.731(a); 20 C.F.R. § 655.731(c)(3)(i)-(iii).

however, because Wirth never achieved the title of assistant professor of anesthesiology. Lubarsky testified that the reason they "could not offer [Wirth] an assistant professor's position [was] because she didn't have the requisite skill set that [the University] could assess." D. & O. at 25. For this reason, the University offered her the visiting professor position because it was the closest position to fit her skill type. D. & O. at 25. After Wirth worked at the University for almost a year, the Clinical Leadership of the Department met to determine whether Wirth should be appointed to the position of assistant professor. D. & O. at 25. The Clinical Leadership of the Department voted "no" to appointing Wirth to assistant professor, which was very rare. *Id.* Therefore, the record shows that if Wirth had the requisite skill set, the University would have hired her as an assistant professor or she would have risen to that status after a "yes" vote of the Clinical Leadership. She did not have the requisite skill however, and was thus only entitled to the benefits given to visiting professors, whether they were hired under H-1B visas or not.

Prevailing Wages for Anesthesiologists

Wirth argues that she should have been paid the actual or prevailing wage of an American anesthesiologist and/or similarly situated employees from September 1, 2006, to March 20, 2007. Comp. Br. 18-19. She asserts that she never taught at the University and was hired to work as a clinical anesthesiologist. Comp. Br. at 24. She asserts that she should have been paid the same wages as wages paid anesthesiologists in a teaching environment and maintains that the ALJ erred because he only allowed discussion of the wages paid H-1B nonimmigrants. Comp. Br. at 25 (citing D. & O. at 17 para. 5). She argues that the University willfully failed to pay the appropriate wage. Comp. Br. at 26. She points out that the second LCA lists the same prevailing wage rate as the first (both listed the prevailing wage as $29,830.00 per year) even though it purported to give her more job duties and even though she was paid more after the amended LCA was filed. Comp. Br. at 27.

Notwithstanding Wirth's arguments to the contrary, we hold that the ALJ properly concluded that the wages paid practicing anesthesiologists in non-teaching environments was neither relevant nor material to Wirth's case because she was hired to work as a clinical anesthesiologist only in teaching hospitals associated with the University of Miami. D. & O. at 48. We agree with the ALJ that Wirth's claims regarding the occupational code and the prevailing wage rate are without merit. The University hired Wirth as a visiting professor of anesthesiology (first LCA) and as a visiting assistant professor/assistant professor (amended LCA). D. & O. at 3-4. Indeed, when Wirth accepted the University's offer of employment, she indicated that she would join the University as a "Visiting Professor with added clinical responsibilities." D. & O. at 14-15. Therefore, because Wirth was hired by a teaching hospital, and was certified to perform work as a clinical anesthesiologist only in a teaching facility, her claims regarding anesthesiology work outside of teaching hospitals fail.

Interest

The ALJ concluded that Wirth was entitled to interest on the unpaid wages, but that because of the unusual circumstances surrounding the current economic downturn, that it was proper to order only simple interest rather than compound interest. D. & O. at 49-51.

The Administrator and Wirth both argue that the ALJ erred in awarding simple rather than compound interest relying on ARB case law. As the Administrator argues, the "current state of the economy (which is reflected in the interest rates charged, whether simple or compound) should not affect the consistent application of relevant Board decisions in this case." Administrator Br. at 6.

We agree with the Administrator and Wirth that based on Board precedent and policies underlying the H-1B statutes and regulations, Wirth is entitled to pre-judgment and post-judgment compound interest on the pay award until the University satisfies the debt.[26] The prejudgment and post judgment interest shall be calculated according to the procedures set out in *Doyle v. Hydro Nuclear Serv.*[27]

CONCLUSION

For the preceding reasons, we conclude that the ALJ's assessment of back wages that the University is obligated to pay Wirth is affirmed, with modifications. (1) The University is obligated to pay Wirth for the two-week period of September 5, 2006, through September 20, 2006, the period required by Wirth to obtain her social security card, and for the period of October 12, 2006, through October 15, 2006. (2) The University is obligated to pay Wirth wages from September 1, 2007, through December 12, 2007, at the rate of $96,000.00 per year. (3) The University is ordered to pay Wirth $1,445.00 for her reasonable cost of transportation home. (4) The University is obligated to pay prejudgment compound interest on the back pay award and post judgment compound interest until the University satisfies its payment obligations.

With respect to the remainder of the ALJ's decision, we conclude (1) that the substantial evidence of record supports the finding that Wirth was in voluntary nonproductive status between August 27, 2006, and September 5, 2006, and between September 21, 2006, and October 11, 2006, for which the University is not obligated to pay wages; (2) that on December 12, 2007, the University effected a bona fide termination of Wirth's employment; (3) that the University does not owe Wirth a housing allowance; and (3) that Wirth's claims regarding the occupational code and the prevailing wage rate are without merit.

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[26] *Amtel Group, Inc.*, ARB No. 04-087, slip op. at 12 (holding that even in absence of express authority under INA, the remedial nature and "make whole" goal of back pay warrants prejudgment compound interest and post judgment interest).

[27] ARB Nos. 99-041, 99-042, 00-012; ALJ No. 1989-ERA-022, slip op. at 18-21 (ARB May 17, 2000).

ORDER

The ALJ's Decision and Order is **AFFIRMED,** in part, and **MODIFIED,** in part, consistent with the preceding discussion and conclusions, and the University is ordered to pay Wirth consistent with and pursuant to this discussion and conclusions. The case is **REMANDED** for the limited purpose of recalculating the award of interest that the University owes to Wirth.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge