In the Matter of:

KEVIN LIMANSETO, **ARB CASE NO. 11-068**

COMPLAINANT, **ALJ CASE NO. 2011-LCA-005**

v. **DATE: June 6, 2013**

GANZE & COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Stanley Dale Radtke, Esq.; *Law Offices of Haitham Edward Ballout;* Burlingame, California

***For the Respondent*:**
Christine Brigagliano, Esq.; *Van Der Hout, Brigagliano & Nightingale, L.L.P.;* San Francisco, California

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*.

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act, as amended (INA or the Act).[1] Kevin Limanseto filed a complaint with the United States Department of

[1] 8 U.S.C.A. §§ 1101-1537 (West 1999 & Thompson Reuters Supp. 2013), as implemented at 20 C.F.R. Part 655, Subparts H and I (2012).

Labor's Wage and Hour Division (WHD) alleging that his employer, Ganze & Company, violated the terms of the INA by failing to pay wages to which he was entitled. The WHD dismissed Limanseto's complaint, and he requested a hearing before an Administrative Law Judge (ALJ). In a Decision and Order issued on June 30, 2011, the ALJ ordered Ganze to pay $156,425.00 in back wages for 154.57 weeks from October 1, 2008, and $1,500.00 reimbursing Limanseto for legal fees, plus interest. Ganze appealed to the Administrative Review Board (ARB). We affirm the ALJ's conclusion that Ganze owes back wages to Limanseto but modify the ordered amount.

BACKGROUND

The facts are generally undisputed. Ganze originally hired Limanseto, a citizen of Indonesia, from January to April 2006 as an unpaid intern to prepare tax returns, which earned him credit for the bachelor's degree program he was pursuing at Sonoma State University. After graduation that year, Limanseto returned to Ganze in August 2006, where he prepared tax returns full-time at $20.00 an hour until July 2007 under the auspices of the optional practical training (OPT) portion of his student visa.

In September 2007, he enrolled at Golden Gate University to pursue a master's degree in taxation. He again returned to Ganze in February 2008 as part of his graduate program at Golden Gate, and the company loaned him $6,000.00 for tuition.[2] Limanseto received his graduate degree on April 24, 2008, and continued to work at Ganze under his F-1 non-immigrant student status.[3] Ganze initially paid him $23.00 an hour. In July 2008, Limanseto earned a raise to $25.30 an hour.

Ganze filed a Form I-129 Petition for Non-immigrant Worker and associated Labor Certificate Application (LCA) on March 8, 2008, with the U.S. Citizenship and Immigration Services (USCIS)[4] seeking to secure H-1B specialty worker status for Limanseto, which USCIS granted on May 9, 2008, for the period October 1, 2008, to September 21, 2011.[5]

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[2] Ganze later forgave $4,993.11 of the loan after making payroll deductions for the remainder during Limanseto's employment. Complainant's Exhibit (CX) 10.

[3] Limanseto's F-1 status permitted him to work for about 12 months following his graduation from Golden Gate University. *See* 8 C.F.R. § 214.2(f)(5) (defining the period of a student's F-1 status as the time a student pursues a full course of study at a certified school or engages in authorized optional practical training (OPT) after completing his studies).

[4] USCIS is an agency within the Department of Homeland Security (DHS). See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002).

[5] CX 8. The Immigration and Naturalization Service (INS) is now the "U.S. Citizenship and Immigration Services" or "USCIS," which is located within DHS. *See*

On August 14, 2008, about six weeks before his LCA employment start date, Ganze "ended the employment relationship" with Limanseto. Ganze sent Limanseto a written notice of termination "for poor performance" and included his accrued vacation pay in his final check.[6] Ganze did not inform USCIS of its termination of Limanseto's employment. Limanseto subsequently found work, using his F-1 student status, with a Bay Area accounting firm from mid-January to mid-April 2009 at $32.00 an hour. He earned about $9,000.00. Limanseto subsequently returned to Indonesia on November 3, 2009, paying his own air transportation fare.

Limanseto filed a complaint with the WHD on December 9, 2009. WHD investigated and found that Ganze had failed to notify USCIS of its termination of Limanseto's employment; in July 2010, a WHD investigator advised Ganze to send a notice of Limanseto's discharge to the USCIS. Ganze did so on August 26, 2010. On November 2, 2010, WHD found that Ganze had not violated the H-1B provisions. Limanseto timely requested a hearing before an ALJ, which was held on June 2, 2011.

Because Ganze failed to effect a bona fide termination of Limanseto's employment, the ALJ found that Ganze was liable for wages for the full period of the H-1B employment. He awarded $156,425.00 plus $1,500.00 as reimbursement in attorney's fees and ordered pre- and post-judgment interest. The ALJ denied Limanseto's request for reimbursement of his air fare home and Ganze's claims for repayment of its tuition loan to Limanseto and an offset for the money he earned in early 2009.[7]

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review an ALJ's decision concerning the INA.[8] The ARB has plenary power to review an ALJ's legal conclusions de novo.[9]

Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002).

6 CX 2 at 14, Respondent's Exhibit (RX) 2.

7 Decision and Order (D. & O.) at 10-14.

8 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845.

9 *Yano Enters., Inc. v. Adm'r*, ARB No. 01-050, ALJ No. 2001-LCA-001, slip op. at 3 (ARB Sept. 26, 2001).

DISCUSSION

The INA permits an employer to hire non-immigrant, H-1B workers in "specialty occupations" to work in the United States for prescribed periods of time in specialized occupations, which require specific knowledge and a relevant degree.[10] An employer seeking to hire an H-1B worker must obtain DOL certification by filing a labor condition application (LCA) and attesting that it will employ an identified person for a specific job, at a specified place, for a specified time, and at a specified wage.[11] The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B non-immigrant for the period of his or her authorized employment.[12]

If the DOL certifies the LCA, the would-be employer then files a petition with the Department of Homeland Security's USCIS. If USCIS grants the petition and authorizes H-1B status for the non-immigrant, the worker applies for an H-1B visa with the Department of State. Only when the State Department has issued the H-1B visa (or approved a change in visa status if the non-immigrant is already in the U.S.) can the non-immigrant work for the employer at the job set forth under the LCA.[13]

On appeal, the ARB accepted two issues for review:[14]

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[10] 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700. "Specialty occupation" means an occupation that requires theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's degree or higher in the particular specialty. 8 U.S.C.A. § 1184(i)(1); 20 C.F.R. § 655.715.

[11] The LCA has 10 cover pages of conditions and instructions to the employer. By signing the LCA under section H, "Declaration of Employer," the employer attests that its statements are true and accurate and that it will comply with the statements set forth in sections E and F of Form ETA 9035CP. Those sections relate to the attorney or agent signing on behalf of the employer and the rate of pay.

[12] 8 U.S.C.A. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.731, 655.732.

[13] 20 C.F.R. § 655.705(a), (b). *See Joshi v. Pegasus Consulting Group, Inc.*, ARB No. 03-034 ALJ No. 2001-LCA-029, slip op. at 2 (ARB July 29, 2003).

[14] Ganze argued in its response brief that Limanseto's complaint should be dismissed as untimely filed because it fired Limanseto on August 14, 2008, and he did not file a claim until October 26, 2009. Response Brief at 11-13. The relevant regulation provides that a complaint must be filed no later than 12 months after the latest date on which the alleged violations were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA. 20 C.F.R. § 655.806(a)(5). Ganze admitted that it did not raise this issue with the ALJ. Therefore, we will not address it. *Adm'r v. Am Truss*, ARB No. 05-032, ALJ No. 2004-LCA-012, slip op. at 4-5 (ARB Feb. 28, 2007).

(1) did the ALJ properly find that Ganze owed Limanseto back wages from October 1, 2008 for 154.57 weeks (the entire three-year period) plus interest because Ganze failed to effect a bona fide termination of employment.

(2) did the ALJ properly find that Ganze was not entitled to offsets for the remainder of a student loan to Limanseto and for income he earned from other employment during the LCA period.

The ALJ's findings

The ALJ noted that a bona fide discharge of an H-1B worker requires the employer to prove that it (1) notified the worker of the employment termination, (2) notified the DHS authorities so that its petition for a non-immigrant worker can be cancelled, and (3) paid for the worker's transportation home. The ALJ found that Ganze did not comply with these requirements because it did not notify ICE until August 26, 2010, which was after Limanseto had filed his complaint, and did not pay for Limanseto's transportation home in November 2009.

The ALJ concluded that Ganze was thus liable for wages for the entire period of the LCA at the actual hourly rate it had paid Limanseto prior to his August 14, 2008 discharge, $25.30 an hour, plus pre-judgment and post-judgment interest.[15] However, because the ALJ found that Ganze was liable for the full amount of wages, the ALJ also concluded that Ganze was not liable for the cost of Limanseto's air fare to Indonesia.

The ALJ rejected Ganze's argument that Limanseto's earnings from another employer during the 2009 tax season should be deducted from its liability on the basis that Limanseto's absence from Ganze flowed from its "bungled attempt" at a bona fide termination.[16] The ALJ also concluded that under the applicable regulations Ganze must repay Limanseto $1,500.00 in filing and legal fees for the H-1B petition.[17] Finally, the ALJ rejected Ganze's argument that its liability be reduced by $4,993.11, which was the remainder of Ganze's $6,000.00 loan to Limanseto to pay tuition in early 2008.[18]

Ganze's arguments on appeal

Ganze argued that because there was no actual employment relationship between it and Limanseto, the ALJ erred in applying the "bona fide" termination test and finding it

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15 D. & O. at 6-8.

16 *Id*. at 9-10, *see* footnotes 52-55.

17 8 C.F.R. §§ 103.7(b)(1), 1182(n)(2)(C)(vi)(II); 20 C.F.R. § 655.731(c)(9)(iii)(C).

18 D. & O. at 11-12.

liable for wages during the entire period of Limanseto's H-1B authorized employment.[19] Ganze contends that this case is distinguishable from *Amtel Group of Florida, Inc. v. Yongmahapkorn*,[20] because the scope of the ARB's review is limited to cases involving an H-1B employment relationship under the INA. Ganze stated that giving three years' back wages to a foreign national who was lawfully fired and never worked in authorized H-1B employment "flies in the face of reason and public policy."[21]

Ganze also argued that if it was liable for back pay, that liability ended long before the end of the H-1B employment period, either when Limanseto accepted other employment, after he left the United States, after Ganze notified USCIS of his discharge, or on December 1, 2008.[22] Finally, Ganze claimed that the ALJ erred in denying offsets for Limanseto's student loan and the outside income he earned.[23]

Liability for H-1B wages

It is undisputed that Limanseto had no employment relationship with Ganze during the period of his H-1B status – Ganze fired him about six weeks before he was to start H-1B work on October 1, 2008. As the ALJ noted, however, that termination notice to Limanseto did not end Ganze's attestations in the LCA.[24]

In signing and filing an LCA, an employer attests that for the entire "period of authorized employment," including non-productive time, it will pay the required wage to the H-1B non-immigrant.[25] However, an employer need not pay H-1B wages for the entire period "if there has been a *bona fide* termination of the employment

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19 Respondent's Brief at 9-13.

20 ARB No. 07-104, ALJ No. 2004-LCA-006, slip op. at 10 (ARB Sept. 29, 2006).

21 Respondent's Brief at 13-17.

22 *Id*. at 22-26. *See* 8 U.S.C. A. § 1182(n)(2)(C)(vii)(III).

23 *Id*. at 26-27. Ganze contends that the ALJ should have deferred to the Administrator's determination of no violation of the LCA. Brief at 7-9. There is no applicable regulation or statute requiring such deference in H-1B cases. Under 20 C.F.R. § 655.840(b), an ALJ "may affirm, deny, reverse, or modify in whole or in part" the Administrator's decision. Under 20 C.F.R § 655.820(a), if a timely request for an administrative hearing is filed, the Administrator's determination is inoperative unless and until the case is dismissed or the ALJ issues an order affirming the decision. We disagree that the ALJ must give deference to the Administrator in these cases.

24 D. & O. at 5.

25 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731(a). See CX 5.

relationship."[26] To effect a *bona fide* termination, the Board has held, the employer must take three steps:

> It must give the employee notice that the employment relationship is terminated. It must notify the Department of Homeland Security [USCIS] that the employment relationship has been terminated. And it must provide the employee with payment for transportation home under certain circumstances.[27]

We agree with the ALJ that Ganze failed to effectuate a bona fide termination of Limanseto's H-1B employment prior to expiration of the entire period of authorized employment. Ganze does not dispute that it did not notify USCIS until August 26, 2010, and did not pay for Limanseto's return home. Nevertheless, for the reasons that follow, we reduce the ALJ's award of damages to the amount that Limanseto, through his attorney, requested before the ALJ.[28]

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[26] 20 C.F.R. § 655.731(c)(7)(ii).

[27] *Gupta v. Jain Software Consulting, Inc*., ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 5 (ARB Mar. 30, 2007) (citations omitted). The Department of Labor comments accompanying adoption of 20 C.F.R. § 655.731(c)(7) when it was promulgated state that:

> The Department would not likely consider it to be a bona fide termination for purposes of [20 C.F.R. § 655.731(c)(7)(ii)] unless INS [USCIS] has been notified that the employment relationship has been terminated pursuant to 8 C.F.R. 241.2(h)(11)(i)(A) and the petition canceled, and the employee has been provided with payment for transportation home where required by section 214(E)(5)(A) of the INA and INS regulations at 8 C.F.R. 214.2(h)(4)(iii)(E).

65 Fed. Reg. 80,171 (Dec. 20, 2000).

[28] We recognize that Limanseto has shifted his position on appeal and now urges the Board to affirm the ALJ's award in its entirety. Complainant's Brief at 10-25. Nevertheless, we will hold Limanseto to the request for relief he presented to the ALJ. *See Uncle Henry's Inc. v. Plaut Consulting Co*., Inc. 399 F.3d 33, 49 (1st Cir. 2005) (affirming district court's ruling that attorney who made representation to court and opposing counsel on specific amount of damages waived any award in excess of that amount). *See also Wallum v. Bell Helicopters Textron*, ARB No. 09-081, ALJ No. 2009-AIR-006, slip op. at 4 (ARB Sept. 2, 2011).

Modification of the ALJ's monetary award

We find that the relief Limanseto requested at the ALJ hearing is a consequence that reasonably flows from Ganze's failure to properly effect a bona fide termination. We also find that it is appropriate to hold Limanseto to the relief he requested and modify the ALJ's order without deciding (1) whether Ganze's failed attempt to terminate the H-1B employment would have required payment of the entire three years promised in the LCA or (2) whether offsets for other wages earned and the duty to mitigate may be considered in H-1B wage disputes.

At the hearing Limanseto's attorney requested only that Limanseto be compensated for his unpaid H-1B salary up until November 2009 when he returned home, less the period of time during which he worked elsewhere. Limanseto's attorney indicated that Limanseto was not seeking as part of his damages any wages he earned in three months in 2009 (mid-January to mid-April) when he worked for another company. The attorney thus represented to the ALJ that Limanseto agreed to limit Ganze's liability for compensation to only 220 days of the authorized H-1B employment period, plus the cost of a return ticket to Jakarta, which the attorney estimated to be about $1,000.00, and reimbursement of the $1,500.00 Limanseto paid in legal fees.[29]

Consistent with our determination that the facts of this case dictate limiting Limanseto's damages to the amount he claimed before the ALJ, we conclude that Ganze's liability for the payment of H-1B wages is limited to the period of October 1, 2008, to November 3, 2009 (when Limanseto returned to Indonesia), less the three-month period during which Limanseto was elsewhere employed,[30] constituting a period of 220 work days for which Limanseto is entitled to payment at the actual wage rate of $25.30 per hour. Thus, the total in H-1B wages that Ganze owes to Limanseto is $44,528.00.

The ALJ found that Limanseto paid for his return home with frequent flier miles and some cash. He nevertheless concluded that Ganze did not "owe the cost of return

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[29] Hearing transcript (HR) at 14-15. At the hearing, the attorney stated that the H-1B wage was $23.00 an hour. In response to the ALJ's post-hearing order, the attorney indicated that the appropriate hourly rate was Limanseto's actual wage when Ganze fired him, $25.30, and the ALJ based his calculation on this amount. Letter Brief at 2. Under 8 U.S.C.A. § 1182(n)(1)(A)(i), the employer's enforceable wage obligation is the actual wage or the prevailing wage, whichever is greater. We calculate the award at the higher rate.

[30] The ALJ concluded that Limanseto was not required to mitigate his damages under the H-1B program by seeking alternative employment. This does not, however, preclude Limanseto from voluntarily offering, as he did, to offset the period for which he claims damages by the three-month period during which he was employed elsewhere. Therefore, we need not decide the issue of mitigation.

transportation" because Ganze was liable for back wages for the entire H-1B period.[31] We have modified the ALJ's award because Limanseto did not seek an award of his salary for the full three-year period and requested payment of his transportation home based on his return to Indonesia prior to the end of his H-1B employment. Accordingly, we hold Ganze liable for Limanseto's transportation costs and order Ganze to reimburse Limanseto the actual cost of his air fare home up to and not exceeding the $1,000.00 requested.[32]

Finally, the ALJ correctly concluded that Limanseto was entitled to reimbursement of the $1,500.00 in legal fees he paid during the H-1B application process, that Ganze was not entitled to offset the balance of the tuition loan,[33] and that pre- and post-judgment interest were applicable.[34]

CONCLUSION

For the foregoing reasons, the Board **AFFIRMS** the ALJ's decision holding Ganze liable to Limanseto for H-1B wages, but **MODIFIES** the ALJ's damages award as follows: Ganze shall pay Limanseto $44,528.00 in back wages and $1,500.00 in reimbursement for legal fees incurred in securing his H-1B application, plus reimbursement of the actual cost of Limanseto's air fare incurred in returning to Indonesia not to exceed $1,000.00, plus pre-judgment and post-judgment interest.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

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[31] D. & O. at 8.

[32] 8 C.F.R. § 214.2(h)(4)(iii)(E); *Adm'r v. Univ. of Miami*, ARB Nos. 10-090, -093; ALJ No. 2009-LCA-026, slip op. at 10-11 (ARB Dec. 10, 2011).

[33] *See Adm'r v. Integrated Informatics, Inc*., ARB No. 08-127, ALJ No. 2007-LCA-026, slip op. at 14 (ARB Jan. 21, 2011) (holding that the complainant's loan agreement with the employer was beyond the ALJ's authority under the INA to enforce).

[34] 26 U.S.C.A. § 6621(a)(2) (federal short-term rate plus three percentage points).